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In The

Supreme Court of the United States

October Term, 1976

No. 77-105

ROBERT PALAGONIA, et al.,

Plaintiffs,

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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In The

Supreme Court of the United States

October Term, 1976

No.

ROBERT PALAGONIA, et al.,

Plaintiffs,

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

The petitioners Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, an infant under the age of 21 years, pray that a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York,

Second Judicial Department, dated and entered February 28, 1977[1] (Appendix, *infra* at 6a-7a). The judgment affirmed the order of the Supreme Court, Westchester County which provided that plaintiffs' right to recover for "mental injuries" under the Warsaw Convention as modified by the Montreal Agreement[2] was available only to the extent permitted by *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 314 N.E. 2d 848, 358 N.Y.S. 2d 97 (1974): *i.e.*, plaintiff may not recover for mental injuries alone even though recovery for mental injuries alone is permitted by the otherwise applicable state law of New York (9a-11a).

OPINIONS BELOW

Set forth at page 1a of the appendix is the unreported order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County, entered without opinion on April 20, 1977, denying petitioners' motion for leave to appeal to the Court of Appeals of the State of New York, on the following certified question:

> "Are plaintiffs entitled to recover for mental injuries alone pursuant to the provisions of the Warsaw Convention as modified by the Montreal Agreement (May 13, 1966) to the extent that such mental injuries would be compensable under otherwise applicable substantive law?"

The unreported order and opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial

1. The respondent herein is the defendant Trans World Airlines, Inc. (hereinafter called "T.W.A.").

2. 49 Stat. 3000, 3018, TS No. 876, 49 U.S.C. §1502, as modified by C.A.B. Agreement No. 18900 filed by T.W.A. on May 10, 1966 and approved by C.A.B. Order No. E23680 appearing at 31 Fed. Reg. 7302 (1966), hereinafter collectively referred to as the "Warsaw-Montreal Regime".

Department, dated and entered February 28, 1977, which affirmed the order of the Supreme Court, Westchester County, is set forth at pages 6a-7a of the appendix.

The unreported order of the Supreme Court of the State of New York, in and for the County of Westchester, dated July 27, 1976, which directed:

> ". . . that with respect to the plaintiffs Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, *that summary judgment on the issue of liability is granted against defendant Trans World Airlines, Inc.* and further that the action of these plaintiffs is severed from the balance of this action and further that there shall be recovery for mental injuries by said plaintiffs only to the limited extent permitted by the decision of the New York Court of Appeals in *Rosman v. TWA*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974)." (Emphasis supplied.)

is set forth at pages 9a-11a of the appendix.

The unreported decision of Robert J. Trainor, Justice of the Supreme Court in and for the County of Westchester, dated July 2, 1976 upon which said order is based, is set forth at pages 12a-14a of the appendix.

JURISDICTION

The order of the Appellate Division dated February 28, 1977 is not subject to further appeal in the Courts of the State of New York because the Appellate Division by its order entered April 20, 1977 has denied the petitioners' motion, made within 30 days after notice of entry of said order, for leave to appeal to

the New York Court of Appeals on the above described certified question. See Sec. 5602 of the Civil Practice Law and Rules of the State of New York, which provides in part:

> "*Appeals to the court of appeals by permission*
>
> (b) *Permission of appellate division.* An appeal may be taken to the court of appeals by permission of the appellate division:
>
> (1) from an order of the appellate division which does not finally determine an action . . . ."

See also *New York Civil Practice,* Weinstein-Korn-Miller, Par. 5602.08 which provides in pertinent part as follows:

> "Paragraph 1 — *From non-final order of appellate divison.*
>
> Paragraph 1 of CPLR 5602(b) covers the Appellate Division's jurisdiction to grant leave to appeal from its own non-final determinations. With the exception of the special provision regarding proceedings by or against a public body or officer (CPLR 5602(a)(2)), *leave of the Appellate Division is the exclusive method for appeal of a non-final determination to the Court of Appeals."* (Emphasis supplied.)

Cf. *Gotthilf v. Sills,* 375 U.S. 79 (1963), where the Court discussed the proper method to appeal a non-final determination under New York state practice which was considered a final judgment for purposes of appeal to the United States Supreme Court.

The order of the Appellate Division herein dated February

28, 1977 is deemed under the Civil Practice Law and Rules of the State of New York to be a non-final order because it does not finally determine the action §5602(b) of the Civil Practice Law and Rules of the State of New York. The same order, within the meaning of 28 U.S.C. Sec. 1257(3) is deemed to be a final judgment for purposes of appeal to the United States Supreme Court, however, because it finally determines all of the federal issues and leaves open for further determination only the amount of recovery allowable to plaintiff under state law. *Rosenblatt v. American Cyanamid Co.,* 86 S. Ct. 1 (1965), *rehearing denied,* 382 U.S. 1002 (1966); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 476-487 (1975); cf. *Gotthilf v. Sills, supra* at 80-83.

Plaintiffs have brought an action against TWA for personal injuries sustained during a hijacking while they were passengers aboard TWA's airliner. They claim absolute liability on the part of TWA pursuant to the Warsaw-Montreal Regime. TWA has conceded its liability for petitioners' damages as a result of the hijacking under the Warsaw-Montreal Regime and the order of the Supreme Court has so adjudged their liability (11a). Petitioners were residents of New York at the time of the hijacking and were in the process of returning on the return leg of a round trip flight on TWA from New York to Israel and return. New York law determines the allowable damage to petitioners (22a, 29a, 31a).

TWA is presently liable pursuant to the order of the Supreme Court for petitioners' personal injuries to the extent allowable and determinable under the applicable New York state law with the exception of mental injuries alone. Mental injuries alone would be recovered by petitioners were it not for the above described contrary determination by the Supreme Court which was sustained by the Appellate Division. See *Husserl v. Swiss Air Transport Company, Ltd.,* 388 F. Supp. 1238 (S.D.N.Y. 1975):

". . . the Warsaw system does not create any claim for relief but . . . (1) creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged and (2) establishes a maximum limit on the potential liability to which a carrier might be subject for an injury caused by an accident in international transportation." *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1243.

* * *

"I believe that the otherwise applicable substantive law should be determined by applying the appropriate conflicts of law principles. Cf. Lowenfels II at 350-51. Since this is a diversity case in a federal court in New York, the appropriate principles are New York conflicts of law principles. See *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941). It is likely that the application of those principles would result in a determination that the substantive law of New York is applicable here. See *Rosenthal v. Warren*, 342 F.Supp. 246 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856, 94 S.Ct. 159, 38 L Ed.2d 106 (1973); *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). See generally Lowenfels I at 526-32. Assuming New York law does apply, that law provides a cause of action for mental and psychosomatic injuries. *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961)." *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1252.

See also *Rosman*, 34 N.Y. 2d 385, 398, 314 N.E. 2d 848, 856:

> "We are also aware that it has generally been held in the United States that Warsaw does not create an independent right of action for personal injuries or death but depends upon the existence of some other basic law at the place of the accident or elsewhere to grant the right of action. (see, e.g., *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393, revd. on other grounds 209 F.2d 436, 438; *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679, cert. den. 355 U.S. 907; *Wyman v. Pan Amer. Airways*, 181 Misc. 963, affd. 267 App. Div. 947, affd. 293 N.Y. 878; but see *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773, affd. 281 App. Div. 965; Calkins, The Cause of Action Under the Warsaw Convention, 26 J. of Air Law and Commerce, 217-236, 323-342.)"

TWA claimed that the provisions of Article 17 of the Warsaw Convention precluded recovery for mental injuries alone. Absent such alleged restriction mental injuries alone may be recovered under New York state law, *Battalla v. State*, 10 N.Y. 2d 237, 219 N.Y.S. 2d 34, 176 N.E. 2d 729 (1961); *Bonilla v. Reeves*, 49 Misc. 2d 273, 279, 267 N.Y.S. 2d 374, 381 (Sup. Ct. 1966), Section 37A of the *General Construction Law of the State of New York*, and *Husserl v. Swiss Air Transport Company Ltd.*, 388 F. Supp. 1238, 1252. The Appellate Division has finally determined that petitioners may not recover for mental injury alone under the Warsaw-Montreal Regime.

All that is left to be determined in petitioners' state court action is the amount of petitioners' damages under New York state law absent mental injuries alone. All federal issues have been determined. Therefore, the Appellate Division order is a

final judgment within the meaning of 28 U.S.C. Sec. 1257(3). The United States Supreme Court has jurisdiction to entertain the petition for a writ of certiorari because petitioners have been deprived of their rights to recover for mental injuries alone under the Warsaw-Montreal Regime. 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, erred in holding that petitioners are precluded by the Warsaw-Montreal Regime from recovering for mental injuries alone to the extent that such mental injuries alone would be compensable under the otherwise applicable substantive law of the State of New York.

TREATIES, STATUTES, ORDER AND REGULATIONS INVOLVED IN THE CASE

The construction of the following provisions of Treaties, Statutes, Order and Regulations are involved in this case:

1. Article 17 of the Warsaw Convention[3], 49 Stat. 3005 in the official French:

"Article 17.

> Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lesion corporelle* subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a board de l'aeronef ou au course de toutes operations d'embarquement et de debarquement." (Emphasis supplied.)

3. The translation of the official but less well known title of the Treaty is: "CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR".

2. The unofficial translation of Article 17 of the Warsaw Convention, 49 Stat. 3018:

"Article 17.

Personal Injuries, etc.

> The carrier shall be liable for damage sustained in the event of the *death or wounding of a passenger or any other bodily injury suffered by a passenger,* if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis supplied.)

3. Article 18 of thc Warsaw Convention, 49 Stat. 3005 in the official French:

"Article 18.

(1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistres ou de marchandises lorsque l'evenement qui a cause le dommage s'est produit pendant le transport aerien.

(2) Le transport aerien, au sens de l'alinea precedent, comprend la periode pendant laquelle les bagages ou marchandises se trouvent sous la garde du transporteur, que ce soit dans un aerodrome ou a board d'un aeronef ou dans un lieu quelconque en cas d'atterrissage en dehors d'un aerodrome.

(3) La periode du transport aerien ne couvre aucum transport terrestre, maritime ou fluvial effectue en dehors d'un aerodrome. Toutefois

lorsqu'un tel transport est effectue dans l'execution du contrat de transport aerien en vue du chargement, de la livraison ou du transbordement, tout dommage est presume, sauf preuve contraire, resulter d'un evenement survenue pendant le transport aerien."

4. The unofficial translation of Article 18 of the Warsaw Convention, 49 Stat. 3019:

"*Article 18.*

Checked baggage, etc.

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air."

5. Article 19 of the Warsaw Convention, 49 Stat. 3005 in the official French:

"*Article 19.*

Le transporteur est responsable du dommage resultant d'un retard dans le transport aerien de voyageurs, bagages ou marchandises."

6. The unofficial translation of Article 19 of the Warsaw Convention, 49 Stat. 3019:

"*Article 19.*

Transportation delay

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods."

7. Article 20 of the Warsaw Convention, 49 Stat. 3005:

"*Article 20.*

(1) Le transporteur n'est pas responsable s'il prouve que lui et ses preposes ont pris toutes les mesures necessaires pour eviter le dommage ou qu'il leur etait impossible de les prendre.

(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aeronef ou de navigation, et que, a tous autres egards, lui et ses preposes ont pris toutes les mesures necessaires pour eviter le dommage."

8. Unofficial translation of Article 20 of the Warsaw Convention, 49 Stat. 3019:

"*Article 20.*

Exemptions

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

9. Article 21 of the Warsaw Convention, 49 Stat. 3006 in the official French:

"*Article 21.*

(1) Dans le cas ou le transporteur fait la preuve que la faute de la personne lesee a cause le dommage ou y a contribue, le tribunal pourra, conformement aux dispositions de sa propre loi, ecarter ou attenuer la responsabilite du transporteur."

10. The unofficial translation of Article 21 of the Warsaw Convention, 49 Stat. 3019:

"*Article 21.*

Contributory Negligence

If the carrier proves that the damage was caused by or contributed to by the negligence of

the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

11. Article 22 of the Warsaw Convention, 49 Stat. 3006 in the official French:

"*Article 22.*

(1) Dans le transport des personnes, la responsibilite du transporteur envers chaque voyageur est limitee a la somme de cent vingt cinq mille francs. Dans le cas ou, d'apres la loi du tribunal saisi, l'indemnite peut etre fixee sous forme de rente, le capital de la rente ne peut depasser cette limite. Toutefois par une convention speciale avec le transporteur, le voyageur pourra fixer une limite de responsabilite plus elevee.

(2) Dans le transport de bagages enregistres et de marchandises, la responsabilite du transporteur est limitee a la somme de deux cent cinquante francs par kilogramme, sauf declaration speciale d'interet a la livraison faite par l'expediteur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplementaire eventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'a concurrence de la somme declaree, a moins qu'il ne prouve qu'elle est superieure a l'interet reel de l'expediteur a la livraison.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsabilite du transporteur est limitee a cinq mille francs par voyageur.

(4) Les sommes indiquees ci-dessus sont considerees comme se rapportant au franc francais constitue par soixante-cinq et demie milligrammes d'or au titre de neuf cents milliemes de fin. Elles pourront etre converties dans chaque monnaie nationale en chiffres ronds."

12. The unofficial translation of Article 22 of the Warsaw Convention, 49 Stat. 3919:

"*Article 22.*

Maximum Liability

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the

passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

13. Article 24 of the Warsaw Convention, 49 Stat. 3006 in the official French:

"*Article 24.*

(1) Dans les cas prevus aux articles 18 et 19 toute action en responsabilite, a quelque titre que ce soit, ne peut etre exercee que dans les conditions et limites prevues par law presente Convention.

(2) Dans les cas prevus a l'article 17, s'appliquent egalement les dispositions de l'alinea precedent, sans prejudice de la determination des personnes qui ont le droit d'agir et de leurs droits respectifs."

14. The unofficial translation of Article 24 of the Warsaw Convention, 49 Stat. 3020:

"*Article 24.*

Actions for certain damages

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

15. Article 36 of the Warsaw Convention, 49 Stat. 3008:

"Article 36

La presente Convention est redigee en francais en un seul exemplaire qui restera depose aux archives du Ministere des Affaires Etrangeres de Pologne, et dont une copie certifiee conforme sera transmise par les soins du Gouvernement Polonais au Gouvernement de chacune des Hautes Parties Contractantes." (Emphasis supplied.)

16. The unofficial translation of Article 36 of the Warsaw Convention, 49 Stat. 3022:

"Article 36.

Deposit of Original Covenant; Certified Copies to be Furnished.

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties." (Emphasis supplied.)

17. Order No. E-23680, adopted May 13, 1966, approving Agreement C.A.B. 18900 relating to liability limitations of the Warsaw Convention and the Hague Protocol, Docket 17325;

and the signed counterpart to Agreement C.A.B. 18900 filed by Trans World Airlines, Inc. on May 10, 1966, which are set forth at pages 53a-60a of the appendix.[4]

18. CPLR Sec. 5602(b), subdivision 1:

"Appeals to the court of appeals by permission

* * *

(b) *Permission of appellate division.* An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action. . ."

19. 28 U.S.C. Section 1257(3):

"§1257. *State courts; appeal; certiorari*

Final judgments of decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

3. By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or

4. Hereinafter respectively the Implementing Order of the C.A.B.; and the Counterpart Agreement of T.W.A.

laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

20. Section 37A of the General Construction Law of the State of New York:

"§ *37-a. Personal injury*

'Personal injury' includes libel, slander and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another."

21. Article IV of the "PROTOCOL to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 23 September 1955"[5] which purports to amend Article 17 of the Warsaw Convention as follows in the pertinent equally official French and English version:

"*Article IV*

L'article de la Convention est supprime et remplace par les dispositions suivantes:

Article 17.

1. Le transporteur est responsable du prejudice survenu *en cas de mort ou de toute lesion corporelle* subie par un passager, par cela seul que le fait qui a cause *la mort ou la lesion corporelle s'est produit a bord* de l'aeronef ou au

5. Hereinafter the "Guatemala Protocol". The official text is contained in ICAO Doc. 8932 (1971), not yet ratified.

cours de toutes operations d'embarquement ou de debarquement. Toutefois, le transporteur n'est pas responsable si la mort ou la lesion corporelle result uniquement de l'etat de sante du passager." (Emphasis supplied.)

"*Article IV*

Article 17 of the Convention shall be deleted and replaced by the following:

Article 17.

1. The carrier is liable for damage sustained in case of *death or personal injury* of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if *the death or injury* resulted solely from the state of health of the passenger." (Emphasis supplied.)

STATEMENT OF CASE

On September 6, 1970, Ellen and Shira Finkelstein, mother and daughter, were passengers on TWA Flight 741, a scheduled flight from Tel Aviv, Israel to New York, New York, with intermediate stops in Athens, Greece and Frankfurt, Germany. Shortly after departure from Frankfurt, Germany, two armed persons ran up the aisle of the plane toward the cockpit. Soon afterwards, an announcement was made over the intercom that the plane had been hijacked by members of the Popular Front for the Liberation of Palestine, an Arab terrorist organization (21a-28a, 31a-36a).

During the entire duration of the flight, the passenger-

plaintiffs feared that they would be killed, either by an intentional act of the hijackers, by an explosion generated by the hand genades carried by the hijackers, or in a crash resulting from a lack of fuel or a faulty landing (21a-28a, 31a-36a).

A few hours after the announcement was made over the intercom, the passenger-plaintiffs were told that the plane would land in the vicinity of Amman, Jordan. The plaintiffs were extremely frightened during the landing because the landing area was not a conventional airport, but a deserted airfield in the desert (Dawson Airfield), being lit only by headlights of vehicles. Their relief from the anxiety generated by the landing was short-lived, however, as the plane was immediately boarded by additional terrorists armed with pistols and machine guns (21a-28a, 31a-36a).

The passenger-plaintiffs were compelled to remain aboard the plane for seven days, during which time they were held under armed guard, threatened with physical harm during interrogation, and subjected to the terror of being shot or blown up with the airplane, threats, hunger, thirst, extreme weather conditions, desert storms and unsanitary conditions. The passenger-plaintiffs sustained both physical and mental injuries as the result of their ordeal. The nature of the injuries suffered by the passenger-plaintiffs herein is set forth more fully in the affidavits submitted in support of the plaintiffs' motion for summary judgment in the court below. The mental trauma resulting in part from the terror and confinement of seven days during the hijacking required sustained treatment of the plaintiffs by a certified psychologist (21a-28a, 31a-36a).

Plaintiffs sued for damages resulting from the hijacking alleging absolute liability on the part of TWA pursuant to the Warsaw-Montreal Regime. A motion was made by petitioners for partial summary judgment in the Supreme Court, Westchester County, for the following relief: determination that

TWA was liable to petitioners under the Warsaw-Montreal Regime for damages resulting from the hijacking; and that included within such damages were mental injuries alone.

The Supreme Court, Westchester County, granted the plaintiffs summary judgment on the issue of liability under the Warsaw-Montreal Regime but limited petitioners recovery for damages by virtue of the provisions of Article 17 of the Warsaw Convention to physical injuries, and those mental injuries caused by so-called physical injuries, as limited by *Rosman v. Trans World Airlines, Inc., supra:*

> "At issue is whether, by virtue of defendant's absolute liability for 'death or wounding . . . or any other bodily injury' as set out in article 17 of the Warsaw Convention [49 U.S. Stat. 3014, 3018], plaintiffs may recover any damages for psychic trauma suffered on board a hijacked aircraft. The preliminary question, in the context of plaintiffs' motions for summary judgment, is whether any triable issue of fact has been presented as to the meaning of critical terms of article 17, the official text of which is in French. For reasons which follow, we conclude that the precise meaning of article 17 is not a disputed issue of fact requiring trial in this case and that summary judgment should be granted to plaintiffs on the issue of liability, to the following extent. *At trial, plaintiffs should be allowed to prove damages for palpable, objective bodily injuries suffered, whether caused by psychic trauma or by the physical conditions on the aircraft, irrespective of impact, but not for psychic trauma alone."* (Emphasis supplied.)[6] 34 N.Y. 2d 385, 388, 314 N.E. 2d 848, 849-850.

6. *Rosman, supra,* concerned the very same hijacking as the present case before the Court.

Petitioners appealed the latter determination to the Supreme Court, Appellate Division. That court affirmed the Supreme Court's, Westchester County, holding that it too was bound by the *Rosman v. TWA, supra,* decision. Petitioners sought leave to appeal to the New York Court of Appeals from that determination on a certified question.

The Appellate Division denied petitioners leave to appeal to the New York Court of Appeals on the certified question thereby exhausting petitioners' remedies in the state courts on this issue. All that is left for determination in this case by the New York state courts is a hearing to fix petitioners' damages under state law, with the exception of mental injuries alone. All federal issues under the Warsaw-Montreal Regime have been determined.

This appeal concerns the construction of the scope of damages responsible under the Warsaw-Montreal Regime. This issue was timely and properly raised by petitioners in the Courts of the State of New York.

REASONS FOR GRANTING THE WRIT

The New York courts below following *Rosman, supra,* have misconstrued the Warsaw-Montreal Regime as to preclude recovery for mental injuries alone.

The reasons for granting the writ herein may be summarized as follows:

1. The *Rosman* decision unlawfully denies the basic common law right of petitioners as well as that of millions of Americans who travel each year to and from the United States on international flights to recover in the event of an accident for mental injuries alone.

2. There is a significant conflict between the *Rosman*

decision and all United States Circuit Courts that have subsequently construed Article 17 of the Warsaw Convention.

3. There is a significant conflict between *Rosman, supra,* and all United States District Courts which have subsequently construed the subject phrase in Article 17 of the Warsaw Convention. These courts have permitted recovery for mental injuries alone under Article 17 and have expressly rejected the *Rosman* decision.

4. The U.S. State Department in the Guatemala Protocol translated the subject phrase "lesion corporelle" to mean personal injuries, a concept that includes mental injuries alone.

5. Assuming for the sake of argument that the phrase "bodily injuries" connotes the restrictive meaning given to it by *Rosman, supra,* such unofficial translation is not correct as the correct translation of "lesion corporelle" is all other injuries to health, *i.e.,* personal injuries, a term which encompasses mental injuries alone. See *infra,* subpart "C" of Argument section.

6. The Court should entertain this appeal now so as to obviate the necessity of a retrial on damages to determine petitioners' damages for mental injuries alone.

A. The *Rosman* decision unlawfully denies the basic common law right of the petitioners as well as that of millions of Americans who travel each year to and from the United States on international flights to recover in the event of an accident for mental injuries alone.

The construction of Article 17 affects the rights of millions of American passengers who in the future will take international flights to and from this country. The issues herein are not only important to passengers who may be involved in a hijacking but they affect all passengers on an international flight to and from this country who may sustain an injury which would be regarded

as "mental" as opposed to "physical". The refusal to compensate for so-called mental injuries alone constitutes a rejection of modern science and a return to the dark ages.

Such refusal represents an unlawful denial of basic common law rights of American citizens to recover for personal injuries in the absence of express statutory provisions denying such rights.

It is the established common law that there may be recovery for mental injuries. Recovery for purely emotional injuries is a principle that has been deeply rooted in the English common law for over 600 years. *I. de S. v. W. de S., Y.B.*, 22 Edw. III, f.99, pl. 60 (1349). Moreover, the principle that damages for psychic trauma are compensable has long been accepted in many American jurisdictions, including the State of New York. *Geraty v. Stern*, 30 Hun.426 (2d Dept. 1883); *Newell v. Whitcher*, 53 Vt. 589 (1880); *Craker v. The Chicago & Northwestern Railway Company*, 36 Wis. 657 (1875); *Brooker v. Silverthorne*, 111 S.C. 553, 99 S.E. 350 (1918). In *Halio v. Lurie*, 15 App. Div. 2d 62, 222 N.Y.S. 2d 759 (2d Dept. 1961), the Appellate Division upheld the right to recovery for purely emotional and psychic injuries, stating:

> "There is no lack of authority in this State, however, for the conclusion that there may be a recovery for mental anguish and suffering, and for physical ailments resulting therefrom, unaccompanied by physical contact. Over 60 years ago, Mr. Justice Gaynor, referring to an action for damages for assault, said (*Prince v. Ridge*, 32 Misc. 666, 667): 'Though there be no battery, and therefore no physical hurt, still the law allows the jury to assess damages for the insult and indignity, and the hurt to the feelings and the mental suffering and the fright caused by the assault . . . ' " 15 App. Div. 2d 62, 65-66. 222 N.Y.S. 2d 759, 762.

These rights may not be lost by implication as suggested by the *Rosman* court. See *Jones v. City of Albany*, 151 N.Y. 223, 45 N.E. 557 (1896) where the court held:

> "It is the general rule that an intention to change the rule of the common law will not be presumed from doubtful statutory provisions; the presumption is that no such change is intended, unless the statute is explicit and clear in that direction. 1 Kent's Com. (3d Ed.) 463; *People v. Palmer*, 109 N.Y. 118." 151 N.Y. 223, 228, 45 N.E. 557, 558.

Neither the Warsaw Convention nor the modifying Montreal Agreement purports to expressly exclude recovery for mental injuries alone.

B. There is a significant conflict between the *Rosman* decision and all United States Circuit Courts that have subsequently construed Article 17 of the Warsaw Convention.

The underlying rationale for the *Rosman* court's construction of the words " . . . death or wounding . . . or any other bodily injury"[7] of Article 17 of the Warsaw Convention so as to preclude mental injuries alone has been expressly refuted by all federal courts that have considered Article 17 subsequent to *Rosman, supra. Day v. Trans World Airlines, Inc.*, 528 F. 2d 31 (2d Cir. 1975), *cert. denied*, ___ U.S. ___, 97 S. Ct. 246 (1976); *Martinez Hernandez v. Air France*, 545 F. 2d 279 (1st Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 1592 (1977); *Evangelinos v. Trans World Airlines, Inc.*, 550 F. 2d 152 (3rd Cir. 1977); *Maugnie v. Compagnie Nationale Air France*, 549 F. 2d 1256 (9th Cir. 1977). The following three federal courts and one state court have expressly rejected the *Rosman* court's interpretation of the subject phrase of Article 17: *Husserl v.*

7. Unofficial translation of ". . .en cas de mort, de blessure ou de toute autre lesion corporelle" contained in the official French version of Article 17.

Swiss Air Transport Company, Ltd., 388 F. Supp. 1238 (S.D.N.Y. 1975); *Krystal v. British Overseas Airways Corporation*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Kalish v. Trans World Airlines, Inc.*, 390 N.Y.S. 2d 1007 (Civ. Ct. 1977).

The court in *Rosman, supra,* held that the drafters of the Warsaw Convention " . . . did not define or discuss what was meant by the phrase 'death or wounding . . . or any other bodily injury' . . . . " 34 N.Y. 2d 385, 395, 314 N.E. 2d 848, 854. Lacking such guidance, the *Rosman* court as an aid for construction looked " . . . to the purposes of the Convention and the ordinary meaning of its terms to apply the 'fundamental principle' that a treaty should receive a liberal interpretation to give effect to its apparent purposes . . . " 34 N.Y. 2d 385, 395, 314 N.E. 2d 848, 854.

The *Rosman* court concluded, relying on pre-Montreal Agreement authority, that the primary purposes of the Warsaw Convention were to limit the liability of the airlines and to bring about international uniformity of application:

> *"The primary objectives of the Convention are* to establish uniform rules of documentation in air transportation (tickets, baggage checks and waybills) and to *limit the liability of the air carriers in case of accident (Block v. Compagnie Nationale Air France,* 386 F. 2d 323, 327, cert. den. 392 U.S. 905.)" (Emphasis supplied.) 34 N.Y. 2d 385, 390, 314 N.E. 2d 848, 851.

> "The apparent purpose of the entire Convention is uniformity among its diverse adherent Nations — the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered. *The*

> *particular provisions limiting liability were designed to assure that only a regulated burden be borne by the air carriers (Eck v. United Arab Airlines,* 15 N.Y. 2d 53, 59, *supra)* [decided 1965 prior to Montreal Agreement], and to afford a more definite basis for passenger recovery (see letter of Secretary of State Cordell Hull dated March 31, 1934, Senate Comm. on Foreign Relations, message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 [1934]. *These liability provisions should, we believe, be interpreted to promote uniformity both of the substance and application of the Convention."* (Emphasis supplied.) 34 N.Y. 2d 385, 396, 314 N.E. 2d 848, 854.

The First Circuit in *Martin Hernandez v. Air France,* 545 F. 2d 279(1st Cir. 1976) backed away from its restrictive interpretation contained in *MacDonald v. Air Canada,* 439 F. 2d 1402 (1st Cir. 1971) and agreed with *Day v. TWA, supra.* Judge McEntee, one of the judges who decided *MacDonald, supra,* in a concurring opinion in *Hernandez, supra,* held as follows:

> "I concur in the result reached by the court and in its reasoning to the extent that it applies the criteria described in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied* —U.S.—97 S.Ct. 246, 50 L.Ed. 2d 172 (1976)." 545 F. 2d 285.

There is a significant conflict between *Day v. TWA, supra,* and *MacDonald v. Air Canada, supra,* as to the purpose of the Warsaw-Montreal Regime.

It is noted that the court overlooks the fact that the Warsaw-Montreal Regime is limited to international flights to and from the United States.

The *Rosman* court sought to construe the Warsaw Convention in accordance with the exact original intention of the drafters of the Convention some fifty years ago without taking into account the obvious changes in the purpose of the Warsaw-Montreal Regime that have been effected by the Montreal Agreement:

> "Looking to the language of the Convention's liability provisions, we are cognizant that, in interpretation of an international agreement, the object is 'to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made.' (Restatement, 2d, Foreign Relations Law of the United States, §146.) The language is to be taken according to its ordinary and natural meaning (*Geofrey v. Riggs, supra; Hamilton v. Erie R.R. Co.*, 219 N.Y. 343, 353, writ of error dsmd. *sub.nom. Erie R.R. Co., v. Hamilton,* 248 U.S. 369)." 34 N.Y. 2d 385, 396, 314 N.E. 2d 848, 854-55.

> *"We deal with the term as used in an international agreement written almost 50 years ago, ..."* (Emphasis supplied.) 34 N.Y. 2d 385, 397, 314 N.E. 2d 848, 855.

In 1929 when the Warsaw Convention was drafted the airline industry was in an embryonic state. The *Rosman* court in accordance with the drafters purported primary intention to *limit the liability* of that infant industry, precluded recovery for

mental injuries alone under Article 17 of the Warsaw Convention. *Rosman,* 34 N.Y. 2d 385, 390, 314 N.E. 2d 848, 851.

All of the cases subsequent to *Rosman, supra,* have refuted both the reasoning and result of *Rosman,* to the extent that recovery for mental injuries alone were precluded. All of these courts have held that since the Montreal Agreement the primary purpose of the Warsaw-Montreal Regime was to protect the passengers and thus the liability coverage of passengers was to be expanded, not restricted.

In *Day v. TWA, supra,* Chief Judge Kaufman, in writing for the court, held that in interpreting Article 17 of the Warsaw Convention[8] effect should be given to the changed expectations of the parties as indicated by the Montreal Agreement:

> "In divining the purposes of the Warsaw Treaty, we find the adoption of 1966 of the Montreal Agreement particularly instructive. This Agreement did not alter the language of Article 17 of the Warsaw Convention. *But it provides decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention."* (Emphasis supplied.) *Day v. TWA, supra,* at 36.

The *Day* court held that as a result of the Montreal Agreement (implementing order and counterpart agreement) and history leading to its creation, the purpose of the Warsaw Convention, is as follows:

> "It cannot be doubted, therefore, that the Warsaw Convention *now* functions to protect the passenger from the many present-day hazards of air travel and also spreads the accident cost of air transportation among all passengers.[15] *Husserl v.*

Swiss Air Transport Company, Ltd., 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (per curiam). This is amply demonstrated by the imposition of absolute liability and the establishment of greatly increased limits of liability. The official statements made by the State Department, the prime mover behind the Montreal modifications, reinforce this conclusion.[16]" (Emphasis supplied and footnotes omitted.) *Day v. TWA, supra*, at 36-37.

The *Rosman* court misunderstood the present purpose of the Warsaw Convention and restrictively construed Article 17 in accordance with the court's mistaken view that the primary purpose of the Warsaw Convention was to limit the liability of the airlines. There is a significant conflict between *Day v. TWA, supra*, at 36-37, and *Rosman*, 34 N.Y. 2d 385, 390, 314 N.E. 2d 848, 851.

The purpose construction given to Article 17 of the Warsaw-Montreal Regime in the *Day* case has been followed and approved by the Third Circuit in *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3rd Cir. 1977). The court in *Evangelinos* held:

"Our task has been significantly facilitated by the Second Circuit's recent decision in *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, —U.S.—, 97 S.Ct. 246, 50 L.Ed. 2d 172 (1976), an identical case arising out of the same incident.[8] See also *Leppo v. Trans World Airlines, Inc.*, Misc. (N.Y. Sup. Ct. No. 21770-1973, Trial Term Part 62, Decision of March 10,

8. In *Day, supra*, the following phrase of Article 17 was construed ". . .in the course of any of the operations of embarking or disembarking in connection with a terrorist attack in a passenger Terminal."

1976, N.Y. County). In the *Day* case, Chief Judge Kaufman, in a thorough and scholarly opinion, carefully analyzed the history and purposes of the Warsaw Convention, as modified. Emphasizing the American experience under the Convention, the current expectation of air carriers governed by the Convention as modified, and the considerations militating in favor of liability in this case, the *Day* court unanimously concluded that the activities of the TWA passengers at the Athens airport fell within the purview of the phrase 'the operations of embarking'. We agree with the result reached in *Day*, although our reasoning differs slightly, and note that there is a substantial interest in uniformity of decision in this area. *Cf Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337 (5th Cir. 1967), *cert. denied*, 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968)." (Footnote omitted.) 550 F. 2d 152, 154-155.

* * *

"To reach any other result would be to freeze the Warsaw Convention in its 1929 mold, when air travel was in its infancy, and to ignore current air travel procedures and the special risks created by the type of violence that resulted in this tragedy." 550 F. 2d 152, 157.

The purpose analysis of *Day v. TWA* has also been approved by the Ninth Circuit in *Maugnie v. Compagnie Nationale Air France, supra*, at 1259 (9th Cir. 1977):

"Today the Convention functions to protect passengers from the hazards of air travel and also

spreads the accident cost of air transportation among all passengers. *Day v. Trans World Airlines, Inc., supra,* 528 F.2d at 36. Taking a broad view of the term 'accident', courts generally have extended air carrier liability to include injuries resulting from such modern air hazards as hijacking and terrorist attacks. *Evangelinos v. Trans World Airlines, Inc.,* —F.2d— (3rd Cir., filed May 4, 1976); *Day v. Trans World Airlines, Inc., supra; Husserl v. Swiss Air Transport Co., Ltd.,* 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973), *In re Tel Aviv,* 405 F.Supp. 154 (D.P.R. 1975); *Burnett v. Trans World Airlines, Inc.,* 368 F.Supp. 1152 (D.N. Mex. 1973); *but see Hernandez v. Air France,* 545 F.2d 279, at 284 (1st Cir. 1976). However, the courts have not been uniform in construing 'in the course of . . .embarking or disembarking' as used in Article 17, due perhaps to the ambiguous history of the Convention and the changes in air transportation technology since the original drafting."

C. There is a significant conflict between *Rosman, supra,* and all United States District Courts which subsequently have construed the subject phrase in Article 17 of the Warsaw Convention.

Furthermore, all federal courts which have considered the subject phrase "death wounding. . .or other bodily injury" subsequent to *Rosman* have expressly refused to follow *Rosman, supra,* and have permitted recovery for mental injuries alone under Article 17 of the Warsaw-Montreal Regime.

See opinion of Judge Tyler in *Husserl v. Swiss Air Transport Company, Ltd.,* 388 F. Supp. 1238, 1251 (S.D.N.Y. 1975):

"In *Burnett v. Trans World Airlines, Inc.,* 368 F.Supp. 1152 (D.N.M. 1973), Judge Steel, in construing Article 17, held that mental anguish alone was not comprehended. But he also held that 'bodily injury' was compensable even though not caused by physical contact and that 'emotional distress . . . directly precipitated by the bodily injury [would be] considered as a part of the bodily injury itself'. 368 F.Supp. at 1158. The New York Court of Appeals construed the phrase at issue similarly in the companion cases of *Herman v. Trans World Airlines, Inc.* and *Rosman v. Trans World Airlines, Inc.,* 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974). Judge Rabin, writing for the majority, held that the airline would be liable for 'palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma.' 358 N.Y.S.2d at 110, 314 N.E.2d at 857. With these scholarly and well-considered opinions, *I respectfully disagree only to the extent that I believe mental injury alone should be compensable,* if the otherwise applicable substantive law provides an appropriate cause of action. To hold otherwise, in my view, would not only create confusing problems of proof but also limit the effectiveness of the Warsaw system in achieving its purpose." (Emphasis supplied.)

Judge Tyler in a previous decision as a matter of *dicta* stated mental injuries alone were precluded. *Husserl v. Swiss Air Transport Company, Ltd.,* 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd,* 485 F. 2d 1240 (2d Cir. 1973). The *Rosman* court cited such *dicta.* 34 N.Y. 2d 385, 400, 314 N.E. 2d 848, 857. As

seen above, however, subsequent to the *Rosman* decision, Judge Tyler had the same issue before him on the merits and he refused to follow *Rosman* and withdrew his *dicta.*

In *Krystal v. British Overseas Airways Corporation,* 403 F. Supp. 1322 (C.D. Cal. 1975), the court held that the notice provision in the counterpart agreement was determinative in permitting recovery for mental injury alone:

> "The issue of recovery for mental distress, alone or in conjunction with physical injuries, is dependent for its resolution on the interpretation given to the applicable section of the Warsaw Convention, and subsequent agreements. The Warsaw Convention, also known by its official title as The Convention for the Unification of Certain Rules Relating to International Transportation by Air, 29 Stat. 3000 et seq., governs the disposition of cases arising from accidents occurring in international air transportation.
>
> * * *
>
> This Court is of the opinion that the effect of the Montreal Agreement is to permit recovery for mental distress. Under the Agreement, the signatory airlines agreed, *inter alia,* that they would print on their tickets a notification to the passenger of the possible applicability of the Warsaw Convention. The Civil Aeronautics Board Order which set out the terms of the Agreement repeated the phrasing of Art. 17 in noting the basis for recovery. 31 Fed.Reg. 7302 (1966). But the actual Notice to which the airlines agreed changed the relevant wording to 'death. . .or personal injury. . .'

> It appears that such notice is determinative of the issue. The fact that 'wounding. . .or bodily injury' is replaced by 'personal injury' in a document intended to notify passengers of the extent of airline liability, suggests an intention to clarify the type of injury which is compensable. Defendant's argument that the alteration was prompted by the need to provide a generalized warning within a limited space is not persuasive. The difference in printing length of the two phrases is minimal.
>
> *This Court is, of course, aware that other courts have reached contrary conclusions."* (Emphasis supplied.) 403 F. Supp. 1322, 1323.

See also *dicta* of Judge Wyatt in *Karfunkel v. Compagnie Nationale Air France, supra,* at 976-977:

> "What plaintiffs argue is that mental anguish is not included in the 'death or wounding . . . or any bodily injury' language of Article 17 of the Convention and thus is not the basis for any claim based on the Convention, but is independent of the Convention.
>
> The obvious flaw in this argument is that the Warsaw Convention does not *create* claims for relief but merely establishes rules for the enforcement of claims created by applicable local law.
>
> The further history of the *Husserl* litigation is instructive in this regard.
>
> After the law of the case had been established by affirmance of the Court of

Appeals of the ruling that hijacking was an 'accident' under Article 17 of the Warsaw Convention, the defendant air carrier raised other arguments before Judge Tyler. One of these was that mental or psychosomatic injury was not included within the language of Article 17. Judge Tyler rejected this argument (388 F.Supp. 1238, 1248-1251) and I elect to follow his reasoning and decision.

There are other decisions reaching a different result. *Rosman v. Trans World Airlines, Inc.* 34 N.Y.2d 385, 358 N.Y.S. 2d 97, 314 N.E.2d 848 (1974); *Burnett v. Trans World Airlines* 368 F.Supp. 1152 (D.N.M. 1973).

But a District Judge in California has followed Judge Tyler's decision. *Krystal v. BOAC,* 403 F.Supp. 1322 (C.D.Cal. 1975)."

In *Kalish v. Trans World Airlines,* 390 N.Y.S. 2d 1007, 1011 (Civ. Ct. 1977) a New York Civil Court refused to follow *Rosman, supra,* and held that the severe emotional trauma sustained by a frightened woman on an international flight aboard a burning plane was

> *". . .tantamount to the infliction of physical blows upon her body, and was the same as if she had suffered additional bodily injuries.*
>
> *Plaintiff has a right to recover for the emotional injuries this Court finds she has sustained and proved, and this is so even where there is no accompanying 'bodily injury'. Battalla v. State,* 26 A.D.2d 203, 272 N.Y.S.2d 28, *aff'd* 24 N.Y.2d 980, 302 N.Y.S.2d 813, 250 N.E.2d 224." (Emphasis supplied.) 390 N.Y.S. 2d 1007, 1011.

Rosman v. TWA, supra, itself has a checkered history. At each level of the judicial process, the court of first instance (Supreme Court), the intermediate Appellate Court (Appellate Division) and final Appellate Court (Court of Appeals) a different result occurred or interpretation was made of the subject phrase in Article 17. *Rosman v. TWA* is really two consolidated cases, *Rosman v. Trans World Airlines, Inc.* and *Herman v. Trans World Airlines, Inc.* The court of first instance in both cases held that mental injuries alone were recoverable. *Herman v. Trans World Airlines, Inc.,* 69 Misc. 2d 642, 330 N.Y.S. 2d 829 (Sup. Ct. 1972). On the intermediate appellate level each court reversed the lower court and remanded for a hearing to determine the correct translation of the official French version of the Warsaw Convention. *Rosman v. Trans World Airlines, Inc.,* 40 App. Div. 2d 963, 338 N.Y.S. 2d 664 (1st Dept. 1972); and *Herman v. Trans World Airlines, Inc.,* 40 App. Div. 2d 850, 337 N.Y.S. 2d 827 (2d Dept. 1972). Justice Hopkins dissented in the latter decision and would have held that mental injuries alone were recoverable. The highest New York court reversed the two Appellate Divisions and held that mental injuries alone were not recoverable. *Rosman v. Trans World Airlines, Inc.,* 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974).

D. The United States State Department in the Guatemala Protocol translated the subject French phrase "lesion corporelle" to mean "personal injury", a concept that includes mental injuries alone.

There is a conflict between *Rosman v. TWA,* 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974) and the translation by the representatives of the United States government to the International Civil Aviation Organization which drafted the Guatemala Protocol. The Guatemala Protocol purported to amend Article 17 of the Warsaw Convention by increasing the

absolute liability of the airlines $100,000. The comparable phrase used in the amended Article 17 in the French official version of the Guatemala Protocol is "en cas de *mort ou de toute lesion corporelle*". In the official English version of the Guatemala Protocol that phrase was written as "death or personal injury". It is well established that the phrase "personal injury" is a word of art among common law lawyers which includes within its meaning "mental injuries alone". Thus, it is the current expectation and understanding of the United States Department of State that the phrase "lesion corporelle" means personal injury. See *Day v. TWA*, 528 F. 2d at pp. 36-37 fn. 15, where Chief Judge Kaufman refers to the Guatemala Protocol as additional proof of the expectation of the United States government and other nations that ". . . the Warsaw Convention now functions to protect the passenger from the many present day hazards of air travel. . .".

The phrase "lesion corporelle" also appears in Article 17 as originally drafted and was previously unofficially translated as "bodily injury" and contrued by the *Rosman* court to exclude mental injuries alone.

The Court should entertain this petition at the present time in order to clarify the law as any further proceedings herein will concern only a computation of petitioners' damages under state law. Petitioners should not be put to the burden of two damage hearings. The construction of the treaty should be resolved now. The intercession of the United States Supreme Court is required as there has been an inconsistent application of United States Treaty Law and petitioners as well as millions of Americans are being denied their common law rights as a result of an erroneous interpretation of the Warsaw-Montreal Regime.

ARGUMENT

Summary of Argument

The phrase "ou de toute autre lesion corporelle" contained in Article 17 of the Warsaw Convention should be construed so as to provide recovery for personal injuries, a concept which includes mental injuries alone, in order to effect the primary purpose of the Warsaw-Montreal Regime to be comprehensive and to compensate passengers for injuries sustained as a result of the hazards of air travel. Further, such construction should be made in accordance with the correct translation of "lesion corporelle" which refers broadly to all injuries to health, *i.e.*, personal injuries. Further, the actual meaning of the phrase "bodily injury" contained in the unofficial translation includes mental injuries alone.

A. The understanding of the United States Government in withdrawing its denunciation of the Warsaw Convention was that the substituted Warsaw-Montreal Regime provided for recovery of "personal injuries", a term which includes mental injuries alone, to the extent that such recovery was available under the otherwise applicable law in the jurisdiction in which suit was pending.

The definition of "personal injury" is an exceedingly broad one (General Construction Law §37-A) and covers every variety of injury to a person's body, *feelings* or reputation. *Bonilla v. Reeves*, 49 Misc. 2d 273, 279, 267 N.Y.S. 2d 374, 381. See also Section 37A of the General Construction Law of the State of New York; *Riddle v. Macfadden*, 201 N.Y. 215, 94 N.E. 644 (1911); and *Battalla v. State, supra.*

This broad concept of personal injuries has been accepted since American colonial times:

"Blackstone classified and distinguished those rights which are annexed to the person as jura personarum. He included within this classification personal security which consists, 'in a person's legal and *uninterrupted enjoyment of his life, his limbs, his body, his health and his* reputation.'[16] Chancellor Kent in his twenty-fourth lecture indicated he approved of this same classification of rights, and stated this classification was carried over into colonial legislative enactments and has always been observed.[17]

The plaintiff urges that Blackstone considered 'injuries to the person' as less extensive in scope and meaning than 'injuries to personal rights.' The majority of the courts have not considered the classification of 'rights of personal security' to be synonymous with 'personal injury'. The generally accepted concept of a 'personal injury' includes injuries to the reputation."[18] (Emphasis supplied and footnotes omitted.) *McNeil v. Tarumianz,* 138 F. Supp. 713, 716 (D. Del. 1956).

See also *Slaughter v. Atlantic Coast Line Railroad Company,* 302 F. 2d 912 (D.C. Cir. 1962) holding that recovery for "personal injury" under Federal Employers Liability Act includes an injury to one's "mental person" as follows:

> ". . .While the F.E.L.A. does not make reference to 'personal' injury, we do not think that this is a material distinction. *The use of the adjective 'personal' does not necessarily carry the connotation of injury to the body of the employee. It often indicates an injury affecting one's physical or mental person as contrasted with injury affecting property. Webster's Third New International Dictionary (1961).* Furthermore, the legislative history of the F.E.L.A. indicates that it was to be limited to actions for 'personal' injury. See e.g. H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1." (Emphasis supplied.) 302 F. 2d 912, 915, fn. 15.

Since 1934, when the United States first adhered to the Warsaw Convention, Article 17 was understood by the Congress to provide for recovery of "Personal Injuries". See margin of unofficial translation of Article 17, 49 Stat. 3018, p. 7, *supra; Herman v. Trans World Airlines, Inc.,* 69 Misc. 2d 642, 644, 330 N.Y.S. 2d 829, 832.

The comments on the floor of the United States Senate of the Senators Albert Gore (July 22, 1965, 111 Cong. Rec. pp. 17881-17884); Robert Kennedy (August 12, 1965, 111 Cong. Rec. pp. 20164-20165); Frank Yarborough (July 6, 1965, 111 Cong. Rec. p. 15596); Sam Ervin (July 14, 1965, 111 Cong. Rec. pp. 16716-16717) urging denunciation of the Warsaw Convention because of the limited liability coverage for "injury or death" do not indicate an understanding that the Warsaw Convention precluded recovery for mental injuries alone. Particularly pertinent are the remarks of Senator Robert Kennedy on the floor of the United States Senate concerning the Warsaw Convention prior to the Montreal Agreement:

> "Over 2 million Americans travel annually on international flights."
>
> "Assuring that they and their families are adequately protected in case of accident is, consequently, a matter of widespread importance. . .No one questions the fact that the protection now afforded international travelers is woefully inadequate." 111 Cong. Rec. 20164 (1965).

The tenor of the remarks in the United States Senate of the above senators urging denunciation of the Warsaw Convention was that a highly profitable industry had injected into the domestic law of the United States by means of a treaty an unfair limitation upon its liability for "death or injury", and as such the senators wished to have that limitation removed and more protection given to the passengers. There is no doubt that the members of the United States Senate did not ascribe a restrictive meaning to the word "injuries".

The United States State Department in a press release announcing the withdrawal of this country's denunciation of the Warsaw Convention understood that the so-called "new interim arrangement (Montreal Agreement)" increased the airlines' liability for passengers' "death or personal injury" and used that term interchangeably with "death, wounding or other bodily injury" of a passenger as follows:

> "At the same time the notice under Article 39 was submitted, the United States Government stated that the action was taken solely *because of dissatisfacation with the low limits of liability for death or personal injury provided in the Convention,* even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955." (Emphasis supplied.) 54 Dep't State Bull. No. 1407, 956 (1966).

The Civil Aeronautics Board (herinafter C.A.B.) in its order approving the Montreal Agreement signed in counterpart by respondent T.W.A. stated that the said Montreal Agreement increased

> ". . .the limitations of liability now applicable to claims for personal injury and death

> under the convention and the protocol". C.A.B. Order No. E-23680 (52a-56a).

The C.A.B. implementing order makes this statement more than once:

> "As indicated, the decision of the United States Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death.
>
> * * *
>
> Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein." C.A.B. Order E 23680, *supra* (52a-56a).

The counterpart agreement signed by T.W.A. provides that the passengers are to be notified:

> ". . .that the liability of [T.W.A.] (name of carrier) . . .for *death of* or *personal injury* to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carriers." (57a-60a). (Emphasis supplied.)

Since the stated consideration for the United States withdrawal of its denunciation of the Warsaw Convention was an increase in the low limits of liability for "death or personal injury (a term which includes mental injuries alone)" under the Convention by means of special contract, this expectation

should be given effect in construing Article 17 of the Convention. *Day v. T.W.A., supra; Krystal v. BOAC, supra; Husserl v. Swiss Air Transport Company, Ltd., supra; Karfunkel v. Compagnie Nationale Air France, supra.* See also *Herman v. TWA,* 69 Misc. 2d 642, 330 N.Y.S. 2d 829; and dissenting opinion of Justice Hopkins in *Herman v. TWA,* 40 App. Div. 2d 850, 851-853, 337 N.Y.S. 2d 827, 829-832. Justice Hopkins suggests passengers as third party beneficiaries of the Montreal Agreement are entitled to recover for mental injuries alone because all ambiguities in the implementing order and counterpart agreement should be resolved in their favor. *Herman v. TWA,* 40 App. Div. 2d 850, 852, 337 N.Y.S. 2d 827, 830, fn. 1. The petitioners' ticket which set forth "conditions of contract" provided that T.W.A.'s liability for damage was pursuant to the Warsaw-Montreal Regime (30a). The ticket's definition of damage includes "death, injury or other damage of whatsoever nature". No restrictive meaning to injury is provided in the "conditions of contract" on the ticket.

The Warsaw-Montreal Regime must be construed to accomplish its obvious purposes. *Ross v. Pan American Airways,* 299 N.Y. 88, 97, 85 N.E. 2d 880, 885 (1949).

The *Rosman* court erroneously held:

> "Thus, as the parties agree, the Montreal Agreement modifies the effect of the Warsaw Convention only to the extent of providing for absolute liability up to $75,000; it does not change the substance of that liability — i.e., the character of the compensable injuries — as it is provided in article 17 of the Convention." 34 N.Y. 2d 385, 391, 314 N.E. 2d 848, 851-852.

Such conclusion is clearly incorrect because the expectations of the United States in withdrawing its denunciation of the Warsaw Convention have resulted in a

change in the construction of the word "accident" in Article 17 of the Warsaw Convention to include injuries resulting from intentional acts of third parties, such as sabotage and hijacking by third parties. T.W.A. could avoid its liability under the Convention prior to the Montreal Agreement by exculpating its negligence. See Article 20(1) of the Warsaw Convention. Thus, prior to the Montreal Agreement intentional torts of third parties could not make T.W.A. liable.

Relying upon the expectations of the United States Government in withdrawing the denunciation of the Warsaw Convention in 1966 as expressed in the Order of Approval of the Montreal Agreement and State Department Press Release referred to above, the interpretation of the word "accident" has been expanded to include intentional acts of third parties such as "sabotage" and "hijacking". See *Husserl v. Swiss Air Transport Company, Ltd.,* 351 F. Supp. 702, 706-707 (S.D.N.Y. 1972), *aff'd per curiam,* 485 F. 2d 1240 (2d Cir. 1973).

Reference is made to the statement of Professor Andreas F. Lowenfeld, Chairman of the United States delegation to the Montreal Conference in 1966:

> "Is a psychic injury a 'bodily injury'? The fact is this was never talked about at Montreal. To the extent that there was any thought about it, the assumption was that the meaning goes back to what was intended in the Warsaw Convention itself." Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma,* 1 Syracuse Journal of International Law and Commerce 345, 347 (1973).

The frequent use of the word "personal injury" in the documents described above, however, indicates that the United States Government thought they were dealing with the whole conglomeration of personal injuries which would be more

specifically defined by the jurisdiction in which the action was pending. In the present case New York, pursuant to *Batalla v. State, supra,* would permit recovery for mental injuries alone.

B. Mental injuries alone should be recoverable under Article 17 of the Convention to effect the purpose of the Warsaw-Montreal Regime.

The provision of Article 17 should be expansively construed so as to protect the passenger from present day hazards of air travel, which includes hijacking and also to satisfy its objective of being comprehensive. *Day v. TWA,* 528 F. 2d 31, 36-37.

See Judge Tyler in *Husserl v. Swiss Air Transport, Inc.,* 351 F. Supp. 702, 707:

> "The policy underpinnings of the Warsaw Convention also lead to this conclusion. The Warsaw Convention as modified functions to redistribute the costs involved in air transportation: the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents, since it physically controls the aircraft and access to it; it is likewise the party most capable of assessing and insuring against the risks associated with air transportation; finally, it is the party most able to distribute efficiently the costs of the first two steps. Although the current problem of hijacking may have been initially unanticipated, it is not unreasonable to assume that the law would leap to fill this logical gap.[5]" (Footnote omitted.)

See also in *Husserl v. Swiss Air Transport Company, Ltd.,* 388 F. Supp. 1238, 1250:

> "But purpose and intent analysis itself is very

useful. Although the draftsmen probably had no specific intent as to whether Article 17 comprehended mental and psychosomatic injuries, they did have a general intent to effect the purpose of the treaty and apparently took some pains to make it comprehensive. That they may have neglected one area should not vitiate the purpose of the Convention. There is no evidence they intended to preclude recovery for any particular type of injury. To regulate in a uniform manner the liability of the carrier, they must have intended to be comprehensive. To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are therefore comprehended by Article 17."

Rosman v. TWA's, supra, restrictive interpretation of the Convention based upon an international uniformity does not take into account that the Warsaw-Montreal Regime is only effective in the United States and its purpose as modified by the Montreal Agreement may differ with the purpose of the treaty unmodified by such Agreement.

The *Rosman* plain language interpretation of "other bodily injuries" presupposes a dichotomy between mind and body, a proposition which has been thoroughly refuted by medical science:

> "The critical language is 'death or wounding of a passenger or any other bodily injury suffered by a passenger'. The inclusion of the term 'bodily' to modify 'injury' cannot be ignored, and in its ordinary usage, the term 'bodily' suggests

opposition to 'mental'. *This traditional dualism may or may not reflect the actual physiological structure of the human organism;* it may be that fright and emotional distress are as much 'bodily', in the sense of 'physiological', as a broken leg. But the relationship between 'mind' and 'body' — a stubborn problem in human thought — is not the question before us nor one we would presume to decide. Rather, in seeking to apply the treaty's terms to the facts before us, we ask whether the treaty's use of the word 'bodily', in its ordinary meaning, can fairly be said to include 'mental'. We deal with the term as used in an international agreement written almost 50 years ago, a term which even today would have little significance in the treaty as an adjective modifying 'injury' except to import a distinction from 'mental'. In our view, therefore, the ordinary, natural meaning of 'bodily injury' as used in Article 17 connotes palpable, conspicuous physical injury,[11] and excludes mental injury with no observable 'bodily', as distinguished from 'behavioral', manifestations." (Footnote omitted.) *Rosman,* 34 N.Y. 2d 385, 396-397, 314 N.E. 2d 848, 855.

Judge Tyler in *Husserl v. Swiss Air Transport Company, Ltd.,* 388 F. Supp. 1238, 1250, to the contrary, concludes:

> "However, 'death', 'wounding', and 'bodily injury' in English or in French can, almost as easily, all be construed to relate to emotional and mental injury. 'Bodily injury' is perhaps particularly significant in this regard because of the vast strides which have been taken relatively recently in the fields of physiology and psychology. It becomes increasingly evident that

> the mind is part of the body. Today, it is commonly recognized that mental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma.[15] Therefore, the phrase at issue could easily be construed to comprehend all personal injuries which directly and adversely affect the organic functions of a human being. This construction could be reinforced by comparing Article 17 with Article 19, the two articles dealing with what could be characterized as personal injury causes of action. Article 19 comprehends injuries arising from delay. Article 17, it could be argued, attempts to make clear that such non-organic, consequential injuries were excluded from it but that all organic personal injuries were included.

15. See e.g., Karl A. Menninger, *The Human Mind,* 22 (3d ed. rev. 1945)."

See also *Herman v. T.W.A.* (dissenting opinion of Justice Hopkins), 40 App. Div. 2d 850, 853, 337 N.Y.S. 2d 827, 831:

> "The nervous system and the psychic processes of the brain are as much a part of the body as the legs or arms."

See also the editorial which introduced the first issue of the Journal of Psychosomatic Medicine:

> "This journal is devoted not to the isolated problems of the diseased mind or the diseased body, but to the interrelationships between emotional life and bodily processes both normal and pathological. On the other hand, it is not

concerned with the metaphysics of the body-mind problem. Emphasis is put on the thesis that there is no logical distinction between 'mind and body' mental and physical. It is assumed that the complex neurophysiology of mood, instinct, and intellect, differs from other physiology in degree of complexity, but not in quality. Hence again divisions of medical disciplines into physiology, neurology, internal medicine, psychiatry and psychology may be convenient for academic administration, but biologically and philosophically these divisions have no validity. It takes for granted that psychic and somatic phenomena takes place in the same biological system and are probably two aspects of the same process, . . ." 1 *Journal of Psychosomatic Medicine*, No. 1, 3-5 (1939).

Thus, the *Rosman* interpretation excluding mental injuries alone is not supported by an analysis of the purpose of the Warsaw-Montreal Regime; by the notes or minutes of the drafters of the Warsaw Convention; or by the actual meaning of "bodily injury".

United States District Judge Tyler was of the opinion that all of the various aids to construe the drafters' intent before and after the convention, as well as the plain meaning of the phrase at issue were undeterminative. *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1249-1250. Judge Tyler's conclusion is that only a "purpose analysis" will assist in arriving at a correct interpretation.

Tyler concluded that the Warsaw-Montreal Regime should be expansively construed because the treaty was intended to be comprehensive.

> "*As indicated in Section I of this opinion,*

> *there is absolutely no indication in either the language of the Convention or its legislative history that the drafters intended to preclude all liability for some types of injury.*[13] But it is also clear that the drafters did wish to limit the carriers' potential liability and to facilitate recovery by injured passengers. All of the provisions of the Convention are clearly designed to effect these purposes. *From the face of the Convention, it appears that the drafters were interested in categorizing the types of causes of action which might be brought against a carrier for damages* caused by an accident in international transportation (Articles 17, 18, and 19), in enumerating the defenses which the carrier could assert *Articles 20 and 21, and in limiting the liability to which the carrier could be subject for each category of injury* (Articles 22 and 24). *In light of these propositions, it is logical to infer that the drafters either believed that the phrase at issue comprehended all personal injuries involving the organic functioning of a human being or neglected to consider injuries not comprehended by the phrase.* If they intended the former, Article 17 *should be interpreted to comprehend mental and psychosomatic injuries. If they had no specific intention, Article 17 should be interpreted in the manner most likely to effect the purposes of the Convention."* (Emphasis supplied and footnote omitted.) *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1248.

See also *Factor v. Laubenheimer*, 290 U.S. 276, 293-294; 54 S. Ct. 191, 195-196 (1933) requiring liberal interpretation of treaties.

"In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. *For that reason if a treaty fairly admits of two constructions, *one restricting the right which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.* Jordan v. Tashiro, 278 U.S. 123, 127, 49 S.Ct. 47, 73 L.Ed. 214; Geofroy v. Riggs, 133 U.S. 258, 271, 10 S.Ct. 295, 33 L.Ed. 642; In re Ross, 140 U.S. 453, 475, 11 S.Ct. 897, 35 L.Ed. 581; Tucker v. Alexandroff, 183 U.S. 424, 437, 22 S.Ct. 195, 46 L.Ed. 264; Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041.

* * *

In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating *to the subject-matter, and to their own practical construction of it. Nielsen v. Johnson, 279 U.S. 47, 52, 49 S.Ct. 223, 73 L.Ed. 607; In re Ross supra at page 467 of 140 U.S., 11 S.Ct. 897; United States v. Texas, 162 U.S. 1, 23, 16 S.Ct. 725, 40 L.Ed. 867; Kinkead v. United States, 150 U.S. 483, 486, 14 S.Ct. 172, 37 L.Ed. 1152; Terrace v. Thompson, 263 U.S. 197, 223, 44 S.Ct. 14, 68 L.Ed. 255. And

in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight. Nielsen v. Johnson, supra, page 52 of 279 U.S., 49 S.Ct. 223; Charlton v. Kelly, 229 U.S. 447, 468, 33 S.Ct. 945, 57 L.Ed. 1274, 46 L.R.A. (N.S.) 397." (Emphasis supplied.)

C. The correct translation of the subject phrase "toute autre lesion corporelle" in Article 17 includes all injuries to health, *i.e.*, personal injuries.[9]

The *Rosman* court, *supra,* conceded that in accordance with Article 36 of the Warsaw Convention, that the French version of the Warsaw Convention was the only official version but it accepted the stipulation of the parties that the subject phrase "toute autre lesion corporelle" was properly translated into English by the phrase "or any other bodily injury" contained in the unofficial translation of Article 17. There is no such stipulation in this action.

The French text of the Warsaw Convention is controlling. *Todok v. Union State Bank,* 281 U.S. 449, 454 (1930). *Rosman,* 34 N.Y. 2d 385, 392, 314 N.E. 2d 848, 852. The "precise meaning" of the Convention is a question of law ". . .and cannot

9. The translations and analysis of the civil law contained herein have been made by Pierre F. de Ravel d'Esclapon, a member of the New York Bar. He is a citizen of France where he was born and educated, receiving both his Baccalaureat and a Degree in Comparative Literature (German and English) and Linguistics from the University of Besancon. He also attended business school at the Ecole des Hautes Etudes Commerciales in Paris. He studied civil law at the University of Montreal Law School from which institution he has received his Licence en Droit and where he was Note Editor of the Revue Juridique Themis. He also received his LLM from Harvard Law School. Mr. de Ravel d'Esclapon has also been Assistant Director of McGill French Summer School in Montreal, Adjunct Professor of French Literature at Sir George Williams University in Montreal and at Boston University.

be treated as a triable issue of fact so as to defeat consideration of a motion for summary judgment". *Rosman,* 34 N.Y. 2d 385, 392, 314 N.E. 2d 848, 852.

The translation of the subject phrase "lesion corporelle" when considered in the context of the civil law translates broadly as all injuries to health and closely corresponds in meaning to the common law concept of personal injuries.

The *Rosman* court held that French law should not control American law, but that an understanding of the French law would be useful in translating the subject phrase. See *Rosman,* 34 N.Y. 2d 385, 394, 314 N.E. 2d 848, 853. "Of course, French legal usage must be considered in arriving at an accurate English translation of the French."

The *Rosman* court relied in part upon a translation by Henry deVries of a French legal treatise to support its construction that "corporel" connoted ". . .an injury which can be seen, which one can touch." This translation was unchallenged by the plaintiffs in *Rosman,* 34 N.Y. 2d 385, 397, 314 N.E. 2d 848, 855, fn. 11.

Professor deVries was acting as counsel for TWA and not as an independent expert. The deVries translation quoted by the court is not in accord with generally accepted French legal concepts. French law does not make a distinction between injuries affecting the mind and those affecting the body. The French Civil law distinguishes between "dommage materiel" and "dommage moral". It would appear that this distinction in the nature of the claim would correspond loosely to the American concepts which distinguish between liquidated and unliquidated damages. Thus, "dommage moral" would include all forms of personal injuries as well as other damages. "Dommage corporel" is a concept combining both "dommage materiel" and "dommage moral", not subject to any specific rules, and clearly includes both so-called "mental" and "physical" suffering. See

article by Georgette Miller, appearing in *Air Law,* Vol. 1, No. 4 (1976) pp. 210, 211, entitled "Compensable Damages under Article 17 of the Warsaw Convention":

> "1. *Brief survey of the relevant principles of the law of damages*
>
> There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of the family, or pain and suffering due to a physical injury. Provided the damage is 'certain' and 'direct', all forms of damage can be compensated to their full extent.[6] This was already the case when the Warsaw Convention was drafted.[7] Although French law does not distinguish between various forms of damage on the basis that only some may be compensated, distinctions are made for analytical and didactic purposes. The basic distinction is between dommage materiel and dommage moral.[8] Dommage materiel is any type of financial loss suffered by the plaintiff. It includes loss of wages as well as medical or funeral expenses; it also includes the loss of any benefit that the plaintiff could have expected to gain by the occurrence of a wrongful act or by a breach of contract. Dommage moral includes all other forms of damage which do not cause a financial loss, such as the breach of the right to privacy, or the sufferings bodily or otherwise, of the victim of an accident, or the moral damage of the family of the victim in case of death.
>
> Dommage corporel is a composite from dommage materiel and dommage moral. It is sometimes used as a description of the various

forms of damages but it does not constitute a class which would be subject to specific rules.[9] It includes all forms of damage which may result from personal injury, e.g., medical expenses, loss of wages, pain and suffering (pretium doloris), damage resulting from loss of attractiveness due to permanent scars, etc. *In other words, dommage corporel includes financial loss (dommage materiel), together with compensation for mental and physical suffering (dommage moral).* (Emphasis supplied.)

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6. The requirement that the damage may be direct may prove difficult to meet in some cases. See the current developments in (1974) *73 Revue Trimestrielle de Droit Civil,* pp. 733ff, 776ff.

7. H. & L. Mazeaud, A. Tunc, *Traite theorique et pratique de la responsabilite civile delictuelle, et contractuelle* (5th ed., Paris, 1957), pp. 416-417.

8. H., L. & J. Mazeaud, *Lecons de Droit civil,* tome 2, vol. 1 (4th Ed. by M. de Juglart, Paris, 1963), pp. 350ff; J. Carbonnier, *Droit civil,* vol. 4 (7th ed., Paris, 1972), pp. 308ff.

9. See Carbonnier, *Droit civil,* vol. 4, pp. 309-310"

The translation of Professor deVries of the passage in H. & L. Mazeaud, A. Tunc, *'Traite' Theorique et Pratique de la Responsibilite Civile,* Vol. 1, pp. 377-378, No. 298 *et seq.* cited in *Rosman, supra,* p. 397, fn. 11 is incorrect. The correct translation is:

> "293. Definitions. Categories of moral damages. Here it is important not to be misled by the very ill-chosen adjectives 'moral' and 'materiel'. At first sight, one could think that 'dommage materiel' is that which can be

> apprehended by the senses, which can be seen, which can be touched, in one word a 'dommage corporel', *within the very wide juridical meaning of the word;* whereas 'dommage moral' is that which only affects the ethereal, invisible field of thoughts and feelings (1): the 'dommage "incorporel"' (1 bis.) *But such is not the true meaning which must be used here.* Numerous are indeed the 'dommages "corporels"' the reparation of which is debated: such as pain and suffering following an accident, a disfiguring wound." (Emphasis supplied.) (Footnotes omitted.)

It is noted that the phrase "dommage corporel" has a very " . . . wide juridical meaning" and is not limited in meaning as suggested by Professor deVries.

The phrase "lesion corporelle" in Article 17 of the Warsaw Convention has been universally understood and used as a shorthand expression by all civil law experts to refer broadly "to injuries to health, or life of person", *i.e.,* personal injuries. See *Traite Elementaire de Droit Civil* by Marcel Planiol and Georges Ripert, 11th Edition, Vol. 2 at No. 868, subdivision 3:

> "3. Atteinte a la sante ou a la vie des personnes, ce qui comprend non seulement les meurtres et les blessures volontaires, mais tous les accidents causes par une faute, faute professionelle des medecins (Paris, 16 Jan. 1913, D. 1913.2.237, Cass. 20 Nov. 1920, P & S 1921.1.119), accidents industriels, accidents de chemin de fer ou de voitures, etc., — Comp. art. 847, c. civ. allemand. En droit romain, on considerait au contraire *la lesion corporelle* comme n'etant pas susceptible d'une reparation en argent, 'cum liberum corpus aestimationem

non recipiat' (Maynz, t.II, p. 26, note 1.)" (Emphasis supplied.)

Deans Planiol and Ripert are well known authorities on civil law. Dean Ripert, in addition, was the French delegate to the 1929 Warsaw Convention. This portion of the treatise has been translated by the Louisiana State Law Institute (Planiol, *Treatise on the Civil Law with the Collaboration of G. Ripert,* West Pub. 1959) to indicate that "lesion corporelle" are all injuries to health as follows:

> "(3) *Injuries to the health or the life of persons,* which include not only intentional wounds, but all accidents caused by fault professional fault of doctors (Paris, 16 Jan. 1913, D.1913.2.237; Cass., 20 Nov. 1920, P. & S. 1921.1.119), industrial accidents, railroad accidents, or of vehicles, etc. — Comp. Art. 847 of the German Civil Code. In Roman law, on the contrary, *corporeal injury* was not considered susceptible of reparation in money, 'Cum liberum corpus aestimationem non recipiat' (Maynz, t.II, p. 26, note 1)." (Emphasis supplied.)

The following air law authorities from civil law countries are cited for their interpretation that "lesion corporelle" includes all injuries to health and is thus a phrase similar to the common law personal injuries.

Judge Otto Riese, of the European Court of Justice, former member of the CITEJA and German delegate to the 1929 Warsaw Convention, an international authority on air law, is of the opinion that the phrase "lesion corporelle", at Article 17, clearly includes psychic trauma independent of anatomical changes in the body. In his *Luftrecht,* (K.F. Koehler Verlag, Stuttgart 1949), at p. 442, he writes:

"Durch die Erwahnung der Gesundheitsbeschadigung (eine etwas freie Ubersetzung des franzosischen Textes, der von 'lesion corporelle' spricht) neben der Korperverletzung ('blessure') soll offenbar klargestellt werden, dass auch jede Beeintrachtigung des physischen oder psychischen Wohlbefindens einzubeziehen ist, die keine mechanische Einwirkung zur Ursache oder keine anatomische Veranderung im Korper zur Folge hat."

Translation:

> "By referring to injury to health (a somewhat free translation of the French text which speaks of 'lesion corporelle') next to wounds ('blessures') it is made crystal clear that also any injury to the physical or psychic well being must be included, although it is not the result of a mechanical influence or does not result in anatomical changes of the body".

Likewise, in a subsequent treatise, Riese & Lacour, *Precis de Droit Aerien International et Suisse* (Librarie Generale de Droit et de Jurisprudence, Paris 1951), at p. 264, No. 323, the authors wrote:

> "II. — CONDITIONS DE LA RESPONSABILITE
>
> 1. — Lesions Corporelles.
>
> 323. — L'article 17 de la Convention de Varsovie rend le transporteur responsable du dommage survenu en cas de mort, de blessures ou de toute autre lesion corporelle subie par un

voyageur durant la periode du transport aerien proprement dit.

La discrimination faite par le texte entre 'la blessure' et 'toute autre lesion corporelle' demontre que la convention doit etre applicable, non pas seulement a la blessure proprement dite, mais egalement a toute atteinte a la sante du passager, telles que les consequences d'un choc psychique ou d'un mal d l'air."

Translation:

"II. — CONDITIONS OF LIABILITY

1. — Personal Injuries.

323. — Article 17 of the Warsaw Convention imposes a liability in the air carrier for damages arising in cases of death, wounds or any other personal injuries suffered by a passenger during the period of the actual air transport.

> The discrimination made in the text between 'wound' and 'any other personal injury' demonstrates that the Convention must be applicable not only to the wound itself but also to any injury to the health of the passenger, such as the consequences of psychic trauma or of air sickness—"

Riese's construction of Article 17 as clearly including all injuries to the passenger's health has been consistently followed by writers in the field of air law, some adding that psychic trauma would be worthy of special mention.

Sesseli, *La Notion de Faute dans la Convention de Varsovie* (Lausanne, 1961, SA de l'Imprimerie Rencontre) at p. 35:

"Qu'il s'agisse du transport de personnes ou de fret, le choix d'expressions tres larges implique que les redacteurs n'ont entendu exclure aucune forme de prejudice du champ d'application de la Convention. Ainsi, les dommages corporels comprennent non seulement les atteintes a l'integrite physique mais egalement les troubles psychiques[12]. (n.12: Cf. Riese p. 442 ss; Riese et Lacour No. 323; de Juglart No. 286; Coquoz, p. 121 ss.)"

Translation:

"Whether it be in the transport of passengers or of freight, the choice of very broad expressions implies that the draftsmen have meant not to exclude any form of prejudice from the field of application of the Convention. Thus, the 'dommages corporels' include not only injuries to physical integrity but also psychic trauma.[12]" (Footnote omitted.)

Jose Bonet Correa, La Responsabilidad en el Derecho Aereo (Madrid, 1963) at p. 67:

> "A juicio de RIESE y LACOUR,[23] la discriminacion hecha en el texto entre 'la herida' y 'toda otra lesion corporal' demuestra que el Convenio debe ser aplicado no solo a la herida propiamente dicha, sino a todo otro atentado a la salud del pasajero, tal como las consecuencias de un shock psiquico o de un mal aereo.[24]"

Translation:

"In the opinion of Riese and Lacour (23), the discrimination in the text between 'wound'

and 'any other personal injury' demonstrates that the Convention must be applicable not only to the wound per se but also to all other injuries to the health of the passenger, such as the consequences of a psychic trauma or of air sickness (24)." (Footnotes omitted.)

Dr. Werner Guldimann, *Internationales Lufttransportrecht* (Zurich, 1965, Schulthess & Co. AG) at p. 100:

"Der primare Korperschaden des Fluggastes, welcher den Gegenstand der vorliegenden Bestimmung bildet, kann entweder in der absoluten Form der Totung oder in der relativen Form der 'lesion corporelle' vorliegen. Das letztere ist nicht nur im engen Sinn der Korperverletzung zu verstehen (das ist die als Spezialfall aufgefuhrte 'blessure'), sondern in weiten Sinne der Gessundheitsschadigung, der wie immer gearteten Beeintrachtigung des Wohlbefindens (Riese 442)."

Translation:

"The primary bodily injury of a passenger, which constitute the object of the definition [at Article 17], can be either in the absolute form of death or in the relative form of 'lesion corporelle'. The latter is to be understood not only in the narrow sense of injury to the body (which is the particular case of the specially mentioned 'blessure'), but in the broader sense of injury to health and of the always related impairments of one's well-being (Riese 442)."

CONCLUSION

We submit that the Warsaw-Montreal Regime provides recovery for mental injuries alone to the extent that such recovery is otherwise available in the State of New York, the jurisdiction in which suit has been brought. We urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

s/ Alvin H. Meadow
Attorney for Petitioners

Pierre F. de Ravel d'Esclapon
Salomon Sassoon
Allan Taub
Delson & Gordon
Of Counsel

APPENDIX

ORDER OF APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT HELD IN KINGS COUNTY DATED APRIL 20, 1977 DENYING PETITIONERS' LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS ON A CERTIFIED QUESTION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 20, 1977

HON. JAMES D. HOPKINS, Acting Presiding Justice

HON. JOHN P. COHALAN, JR.,

HON. VINCENT D. DAMIANI, *Associate Justices*

HON. JOSEPH F. HAWKINS,

Robert Palagonia et al.,

Plaintiffs,

Ellen Finkelstein et al.,

Appellants,

v.

Trans World Airlines, Inc.,

Respondent.

In the above entitled cause, the above named appellants

Order of the Appellate Division

having moved for leave to appeal to the Court of Appeals; from an order of this court, dated February 28, 1977, which affirmed an order of the Supreme Court, Westchester County, dated July 27, 1976;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied, without costs and without oral argument.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

No. 2055

Robert Palagonia et al., plaintiffs, Ellen Finkelstein et al., appellants v. Trans World Airlines, Inc., respondent.

Motion by appellants for leave to appeal to the Court of Appeals from an order of this court dated February 28, 1977, which affirmed an order of the Supreme Court, Westchester County, dated July 27, 1976.

Motion denied, without costs and without oral argument.

HOPKINS, Acting P.J., COHALAN, DAMIANI and HAWKINS, JJ., concur.

April 20, 1977 DOLINSKY (RUBIN) v RUBIN No. 1917
PALAGONIA v TRANS WORLD AIRLINES No. 2055

PETITIONERS' NOTICE OF MOTION FOR LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS DATED MARCH 30, 1977

NEW YORK SUPREME COURT
APPELLATE DIVISION : SECOND DEPARTMENT

ROBERT PALAGONIA, et al.,

Plaintiffs,

ELLEN FINKELSTEIN, et al.,

Plaintiffs-Appellants,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant-Respondent.

Westchester County
Index No. 03189-72
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Appeal Argued
February 14, 1977
No. 501E

S I R S :

PLEASE TAKE NOTICE that upon the affidavit of Alvin H. Meadow, sworn to March 30, 1977, and upon the Order dated July 27, 1976 and filed in the Office of the Clerk of the County of Westchester on August 3, 1976, directing that there shall be recovery for mental injuries only to the limited extent permitted by the decision of the New York Court of Appeals in

Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 358 N.Y.S. 2d 97 (1974), and upon the Order of the Appellate Division Second Department entered in the Office of the Clerk of the Appellate Division Second Department, decided February 28, 1977 affirming the Order appealed from in part, and an opinion by the acting presiding Justice Hon. James D. Hopkins concurred in by the other three sitting Justices, and upon the Record on Appeal to this Court from the Order entered in the Office of the Clerk of the County of Westchester on August 3, 1976 and upon all prior proceedings, the undersigned will move this Court at a term to be held at the Courthouse, 45 Monroe Place, Brooklyn, New York, on April 15, 1977, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order granting leave of the plaintiff to appeal to the Court of Appeals from the Order of the Appellate Division upon the grounds that:

(a) The Appellate Division and Special Term have decided the issue appealed which is the subject of appeal in this case because they were of the opinion that they were bound by the decision of the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, which in the opinion of the plaintiffs-appellants was erroneously decided.

(b) That *Rosman* involved an interpretation of novel law and that all decisions subsequent to *Rosman* have ruled contrary to such decision, and additional arguments not previously made will be advanced to the Court of Appeals.

(c) It is well established that the New York Court of Appeals is not bound by its previous decisions and where it is established that it has rendered an erroneous decision it may choose not to follow the precedent of a previous decision.

AND for the certificate of the Appellate Division certifying

the questions of law decisive of the correctness of its determination, and that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals as follows:

> Are plaintiffs entitled to recover for mental injuries alone pursuant to the provisions of the Warsaw Convention as modified by the Montreal Agreement (May 13, 1966) to the extent that such mental injuries would be compensable under otherwise applicable substantive law?

PLEASE TAKE FURTHER NOTICE that pursuant to Section 2214 (b) of the CPLR, answering affidavits must be served upon the undersigned at least five (5) days before the return date of this motion.

Dated: New York, N.Y.
March 30, 1977

Yours, etc.

DELSON & GORDON
Attorneys for Plaintiffs
230 Park Avenue
New York, N.Y. 10017
(212) 686-8030

TO:
CHADBOURNE, PARKE,
WHITESIDE & WOLFF, ESQS.
Attorneys for Defendant-Respondent
30 Rockefeller Plaza
New York, N.Y. 10020
(212) 541-5800

DECISION OF APPELLATE DIVISION DENYING PETITIONERS' APPEAL FROM THE ORDER OF THE SUPREME COURT WESTCHESTER COUNTY WHICH PROVIDED THAT PETITIONERS' RECOVERY FOR "MENTAL INJURIES" WOULD BE LIMITED TO THE "EXTENT PERMITTED" IN *ROSMAN V. TRANS WORLD AIRLINES* (34 NY 2d 385)

____A D 2d ____ A — February 15, 1977

501 E Robert Palagonia et al., plaintiffs,
Ellen Finkelstein et al., appellants,
v. Trans World Airlines, Inc.,
respondent.

Delson & Gordon, New York, N.Y. (Alvin H. Meadow, Richard H. Silberberg, Allan Taub and Simon J. Liebowitz of counsel), for appellants.

Chadbourne, Parke, Whiteside & Wolff, New York, N.Y. (John N. Romans, Hilton H. Stothers, Jr. and Paul G. Pennoyer, Jr. of counsel), for respondent.

In an action *inter alia* to recover damages for personal injuries and mental anguish, the appeal is from so much of an order of the Supreme Court, Westchester County, dated July 27, 1976, as upon granting appellants' motion for partial summary judgment, provided that their recovery for "mental injuries" would be limited to the "extent permitted" in *Rosman v. Trans World Airlines* (34 NY 2d 385).

Order affirmed insofar as appealed from, with $50.00 costs and disbursements.

We are bound by the holding of *Rosman v. Trans World Airlines* (34 NY 2d 385, *supra*), which is dispositive of this appeal.

Decision of Appellate Division Denying Petitioners' Appeal

HOPKINS, Acting P.J., COHALAN, DAMIANI and HAWKINS, JJ., concur.

February 28, 1977 PALAGONIA; FINKELSTEIN v. 501E
TRANS WORLD AIRLINES INC.

NOTICE OF APPEAL FROM ORDER OF THE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA, et al.,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

SIRS:

PLEASE TAKE NOTICE, that the plaintiffs, Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, an infant under the age of 21 years, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department from so much and such part of the Order entered in the above-entitled action in the Office of the Clerk of the County of Westchester on August 3, 1976, as denies partial summary judgment against the defendant on the issue of liability insofar

Notice of Appeal from Order of the Supreme Court

as the order determines that said plaintiffs may recover for mental injuries only to the limited extent permitted by the decision of the New York Court of Appeals in *Rosman v. T.W.A.*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974), and from such part only, and said plaintiffs do not appeal from any other part of the Order except as herein specifically set forth.

Dated: New York, New York
August 27, 1976

Yours, etc.,

DELSON & GORDON, ESQS.
Attorneys for Plaintiffs
Office & P. O. Address
230 Park Avenue
New York, New York 10017
(212) 686-8030

TO:
CLERK OF THE SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
110 Grove Street
White Plains, New York 10601

CHADBOURNE, PARKE, WHITESIDE
& WOLFF, ESQS.
Attorneys for Defendant
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

ORDER OF SUPREME COURT

At a Special Term, Part I, of the Supreme Court for the State of New York in and for the County of Westchester, at the Courthouse, 110 Grove Street, White Plains, New York on the 27th day of July 1976.

PRESENT:

HON. ROBERT J. TRAINOR,

Justice.

ROBERT PALAGONIA, et al.,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

Upon the notice of motion dated May 13, 1976 of the plaintiffs Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, an infant under the age of 21 years, for an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of said plaintiffs upon the issue of liability on the ground that defendant is absolutely liable to said plaintiffs and that there is no defense to said plaintiffs' causes of action, and further for an order severing said plaintiffs' causes of action from the

balance of this action, and for a further order pursuant to Rule 3212(c) of the CPLR directing immediate trial to assess plaintiffs' damages, including both physical and mental injuries, and such other and further relief as this Court may deem proper in the premises; and upon the amended complaint, the answer of defendant to the amended complaint, the affidavit of plaintiff Shira Finkelstein with exhibits annexed, sworn to May 12, 1976, the affidavit of Sidney J. Finkelstein, sworn to May 12, 1976, the affidavit of Ellen Finkelstein, with exhibits annexed, sworn to May 12, 1976, the affidavit of Alvin H. Meadow, sworn to May 12, 1976, the transcript of the deposition of Ellen Finkelstein taken October 20, 1975, the transcript of the deposition of Shira Finkelstein taken July 17, 1972, and all the proceedings heretofore had herein, all of the foregoing being in support of the plaintiffs' motion and having been duly served upon the defendant; and upon the notice of cross-motion of the defendant Trans World Airlines, Inc. dated June 11, 1976 for an order granting partial summary judgment on the issue of liability in favor of the plaintiff Robert Palagonia, severing his cause of action from those of the other 27 plaintiffs and directing an immediate trial on the issue of alleged damages of Robert Palagonia, and for such other and further relief as to this Court may seem just and proper, and upon the affidavit of John N. Romans sworn to June 11, 1976 in opposition to the plaintiffs' motion and in support of the defendant's cross-motion, all of the foregoing having been duly served upon plaintiffs; and the motion having come to be heard before Honorable Robert J. Trainor, presiding over Special Term, Part I of this Court on the 23rd day of June 1976, and Alvin H. Meadow, Esq., of counsel for Delson & Gordon, attorneys for plaintiffs, having appeared in support of plaintiffs' motion; and John N. Romans, Esq., of counsel to Chadbourne, Parke, Whiteside & Wolff, attorneys for the defendant, having appeared for defendant in opposition to the plaintiffs' motion and in support of the defendant's cross-motion, and oral argument having been had before the Court,

and the Court having duly considered the said motions and having rendered its decision in a writing dated July 2, 1976,

NOW, on motion of Delson & Gordon, attorneys for plaintiffs, it is hereby

ORDERED, that with respect to the plaintiffs Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, that summary judgment on the issue of liability is granted against defendant Trans World Airlines, Inc. and further that the action of these plaintiffs is severed from the balance of this action and further that there shall be recovery for mental injuries by said plaintiffs only to the limited extent permitted by the decision of the New York Court of Appeals in *Rosman v. TWA*, 34 NY 2d 385, 314 N.E. 2d 848, 358 NYS 2d 97 (1974) and further that the said plaintiffs' demand for an immediate trial is denied without prejudice pending the completion of the deposition of the plaintiff, Sidney J. Finkelstein by defendant; and

IT IS FURTHER ORDERED that summary judgment on the issue of liability was granted to the plaintiff Robert Palagonia against the defendant Trans World Airlines, Inc., and further the action of Robert Palagonia is severed from the balance of the action, and an immediate trial on the issue of damages is directed, and counsel for either party are directed to file a note of issue and serve a copy of this Order on the Calendar Clerk with Notice of Entry, and at the same time request an earliest possible date for trial on damages, subject, however, to other actions presently pending, and the disposition of the Justice then and there presiding.

ENTER,

s/ Robert J. Trainor

Justice

DECISION OF SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA,WILLIAM D.KOSTER,"BENJAMIN FEINSTEIN, individually and as Father and Natural Guardian of STUART FEINSTEIN, DANIEL FEINSTEIN, HOWARD FEINSTEIN AND ELLEN FEINSTEIN, each infants under the age of fourteen (14) years, NOAMI FEINSTEIN, ERNA Z. JANKELOVITS, ARYEJ JANKELOVITS, individually and as Father and Natural Guardian of JEFFREY M. JANKELOVITS AND ERIC R. JANKELOVITS, each infants under the age of fourteen (14) years, MARK W. SHAIN, ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as Father and Natural Guardian of SHIRA FINKELSTEIN, an infant under the age of twenty-one (21) years, GERALD BERKOWITZ, individually and as Father and Natural Guardian of DAVID RAAB, MOSHE RAAB, infants under the age of twenty-one (21) years, and MENACHEM RAAB, as Father and Natural Guardian of TAKVA RAAB, NOAM RAAB and YARON RAAB, infants under the age of fourteen (14) years, SYLVIA JACOBSON and YAAKOV DRILLMAN,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

TRAINOR, J.

This is an application by three of the 28 plaintiffs herein, for

an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment. The moving plaintiffs are, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, and Ellen Finkelstein. Shira and Ellen Finkelstein were passengers on TWA Flight 741 proceeding from Tel-Aviv, Israel, to New York on September 6, 1970, when said flight was hijacked to Dawson Air Field, an abandoned World War II airfield in the vicinity of Amman, Jordan, where the two female defendants were detained and subsequently released and returned home. In addition to seeking summary judgment and an assessment of damages, plaintiffs seek a severance of their cause of action, which this the Court heretofore granted from the bench. They also move for an immediate trial and for damages, including both physical and mental injuries, both of which are denied. With respect to an immediate trial, it appears from the opposing papers that plaintiff, Sidney J. Finkelstein, has not been deposed and the trial will, of necessity have to await completion of all pretrial procedures. With respect to the inclusion of damages for mental injuries at the trial, the Court must deny such relief in the light of the holding in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 314 N.E. 2d 848, 358 N.Y.S. 2d 97 (1974). In effect, what plaintiffs are asking is that this Court reverse the holding in *Rosman*, which action did not permit damages for mental injuries, and follow the holding of the Federal District Court in *Husserl v. Swissair Transport Company, Ltd.*, 388 F. Supp. 1238 (S.D.N.Y. 1975). The doctrine of stare decisis mandates that lower state courts follow the holding by the New York Court of Appeals.

Defendant, Trans World Airlines, Inc. has cross-moved for an order granting partial summary judgment on the issue of liability in favor of plaintiff Robert Palagonia, severing his cause of action from those of the other 27 plaintiffs, and directing an immediate trial on the issue of damages. This Court has herefore

granted from the bench, upon oral argument the application for a severance, and now grants the balance of defendants motion, and authorizes counsel for either party to file a note of issue, serve a copy of this order upon the Calendar Clerk, with notice of entry, and at the same time request the earliest possible date for an assessment of damages, subject however to other acions presently pending, and subject to the disposition of the Justice then and there presiding.

Submit order.

Dated: White Plains, New York

July 2, 1976.

s/ ROBERT J. TRAINOR
Justice of the Supreme Court

DELSON & GORDON, ESQS.
Attorney for Ellen and Sidney Finkelstein etc., Plaintiffs
230 Park Avenue
New York, New York 10017

CHADBOURNE, PARKE, WHITESIDE & WOLFF, ESQS.
Attorneys for Trans World Airlines, Defendant
30 Rockefeller Plaza
New York, New York 10020

NOTE OF ISSUE OF MOTION BY PETITIONERS FOR SUMMARY JUDGMENT DATED MAY 27, 1976

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA, WILLIAM D. KOSTER, BENJAMIN FEINSTEIN, individually and as Father and Natural Guardian of STUART FEINSTEIN, DANIEL FEINSTEIN, HOWARD FEINSTEIN and ELLEN FEINSTEIN, each infants under the age of fourteen (14) years, NAOMI FEINSTEIN, ERNA Z. JANKELOVITS, ARYEJ JANKELOVITS, individually and as Father and Natural Guardian of JEFFREY M. JANKELOVITS and ERIC R. JANKELOVITS, each infants under the age of fourteen (14) years, MARK W. SHAIN, ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as Father and Natural Guardian of SHIRA FINKELSTEIN, an infant under the age of twenty-one (21) years, GERALD BERKOWITZ, individually and as Father and Natural Guardian of TALIA BERKOWITZ, an infant under the age of fourteen (14) years, RUTH BERKOWITZ, SARA RAAB, MENACHEM RAAB, individually and as Father and Natural Guardian of DAVID RAAB, MOSHE RAAB, infants under the age of twenty-one (21) years, and MENACHEM RAAB, as Father and Natural Guardian of TIKVA RAAB, NOAM RAAB and YARON RAAB, infants under the age of fourteen (14) years, SYLVIA JACOBSON and YAAKOV DRILLMAN,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Note of Issue of Motion

Index No.
03189/72

Moving Party:

Delson & Gordon, Esqs.
230 Park Avenue
New York, New York 10017
(212) 686-8030
Attorneys for Plaintiffs
Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, an infant under the age of twenty-one (21) years

Responding Party:

Chadbourne, Parke, Whiteside & Wolff, Esqs.
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800
Attorneys for Defendant
Trans World Airlines, Inc.

Return Date of Motion:

June 17, 1976
Special Term, Part I

Relief Requested:

An order granting partial summary judgment in favor of

Note of Issue of Motion

plaintiffs Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, and Ellen Finkelstein, against Trans World Airlines, Inc. on the issue of liability on the ground that defendant is absolutely liable to said plaintiffs and that there is no defense to said plaintiffs' causes of action, and further for an order severing said plaintiffs' causes of action from the balance of this action, and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages, including both physical and mental injuries, and for such other and further relief as this Court may deem proper in the premises.

Nature of Action:

Action for damages and personal injuries as a result of hijacking pursuant to the Warsaw Convention as modified and implemented by the Montreal Treaty.

Index No.:

03189/72

Note of Issue of Motion

Calendar No.:

No calendar number has been assigned.

Dated: New York, N.Y.
May 27, 1976

Yours, etc.

DELSON & GORDON
Attorneys for Plaintiffs
Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, an infant, and Ellen Finkelstein
230 Park Avenue
New York, N.Y. 10017

To:

CHADBOURNE, PARKE, WHITESIDE & WOLFF, ESQS.
Attorneys for Defendant Trans World Airlines Inc.
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

NOTICE OF MOTION BY PETITIONERS FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA, WILLIAM D. KOSTER,

Notice of Motion

BENJAMIN FEINSTEIN, individually and as Father and Natural Guardian of STUART FEINSTEIN, DANIEL FEINSTEIN, HOWARD FEINSTEIN and ELLEN FEINSTEIN, each infants under the age of fourteen (14) years, NAOMI FEINSTEIN, ERNA Z. JANKELOVITS, ARYEJ JANKELOVITS, individually and as Father and Natural Guardian of JEFFREY M. JANKELOVITS and ERIC R. JANKELOVITS, each infants under the age of fourteen (14) years, MARK W. SHAIN, ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as Father and Natural Guardian of SHIRA FINKELSTEIN, an infant under the age of twenty-one (21) years, GERALD BERKOWITZ, individually and as Father and Natural Guardian of TALIA BERKOWITZ, an infant under the age of fourteen (14) years, RUTH BERKOWITZ, SARA RAAB, MENACHEM RAAB, individually and as Father and Natural Guardian of DAVID RAAB, MOSHE RAAB, infants under the age of twenty-one (21) years, and MENACHEM RAAB, as Father and Natural Guardian of TIKVA RAAB, NOAM RAAB and YARON RAAB, infants under the age of fourteen (14) years, SYLVIA JACOBSON and YAAKOV DRILLMAN,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

S I R S:

PLEASE TAKE NOTICE that upon the summons, amended complaint, answer to the amended complaint, the

Notice of Motion

affidavit of plaintiff Shira Finkelstein duly sworn to the 12th day of May, 1976, the affidavit of Sidney J. Finkelstein duly sworn to the 12th day of May, 1976, the affidavit of Ellen Finkelstein duly sworn to the 12th day of May, 1976, and the affidavit of Alvin H. Meadow, duly sworn to the 12th day of May, 1976, and all prior proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Westchester, at the Courthouse thereof located at 166 Main Street, White Plains, New York on the 17th day of June, 1976, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of plaintiffs, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, and Ellen Finkelstein and against defendant Trans World Airlines, Inc. on the issue of liability on the ground that defendant is absolutely liable to said plaintiffs and that there is no defense to the said plaintiffs' causes of action and further for an order severing said plaintiffs' causes of action from the balance of this action and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages, including both physical and mental injuries, and for such other and further relief as this Court may deem proper in the premises.

PLEASE TAKE FURTHER NOTICE that pursuant to Section 2214(b) of the CPLR answering affidavits, if any, shall be served upon the undersigned at least five (5) days before the return date of this motion.

Dated: New York, N.Y.
May 13th, 1976

Notice of Motion

DELSON & GORDON
Attorneys for Plaintiffs
230 Park Avenue
New York, New York 10017
(212) 686-8030

TO:

CHADBOURNE, PARKE, WHITESIDE
& WOLFF, ESQS.
Attorneys for Defendant
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

AFFIDAVIT OF ELLEN FINKELSTEIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA, et al,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

Affidavit of Ellen Finkelstein

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss :

ELLEN FINKELSTEIN, being duly sworn, deposes and says:

1. That she is one of the plaintiffs in the above entitled action; deponent's birth date is August 15, 1921 and deponent at the time of the flight and at the present is a citizen of the United States of America; and resides with her husband, plaintiff Sidney J. Finkelstein, at 1615 52nd Street, Brooklyn, New York.

2. This affidavit is submitted in support of your deponent's motion for an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of plaintiff Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, and Ellen Finkelstein and against defendant Trans World Airlines, Inc. (hereinafter referred to as "TWA") on the issue of liability on the ground that defendant is absolutely liable to the plaintiffs and there is no defense to the said plaintiffs' cause of action, and further for an order severing said plaintiffs' causes of action from the balance of this action, and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages for both mental and physical injuries, and for such other and further relief as this Court may deem proper in the premises.

3. On September 6, 1970, your deponent was a passenger for hire on defendant TWA's regularly scheduled Flight 741 proceeding from Tel-Aviv, Israel to New York, New York, with intermediate stops being made in Athens, Greece and Frankfurt, Germany, pursuant to a paid TWA ticket which provided for roundtrip air transportation between New York and Tel-Aviv. Annexed hereto as Exhibit "A" is a true copy of the said airplane ticket.

Affidavit of Ellen Finkelstein

4. Your deponent was travelling with her daughter, plaintiff Shira Finkelstein, who at the time was seventeen (17) years of age. Shortly after the flight departed from Frankfurt, on or about September 6, 1970, while the plane was in the air, I observed two armed men running up the aisle of the plane towards the cockpit. Soon afterwards, I heard an announcement over the intercom of the plane that the plane had become hijacked. These individuals, at a later time, identified themselves as members of the Popular Front for the Liberation of Palestine.

5. I became extremely frightened because I realized the plane would be diverted to an Arab country where, because I am Jewish, my life would be in great danger. Throughout the duration of the flight I feared that I would be shot or blown up by hand grenades carried by the hijackers.

6. Several hours later we were told that the plane would land in a desert area in the vicinity of Amman, Jordon. The plane landed with some difficulty in a dark isolated area which consisted of an abandoned airfield used during World War II, named "Dawson Air Field". The landing took place in almost complete darkness and the landing field was lit by the headlights of vehicles.

7. Your deponent was terrified as guerrilas armed with pistols and machine guns boarded the plane. Along with other passengers I was ordered to surrender my passport and move to another section of the plane. We were told that we were being held until certain demands on various countries, including the United States, were met.

8. I was forced to remain on board the plane for approximately seven days during which time my freedom of movement was severely restricted and I was required to mostly sit in my seat. My baggage was searched and my personal

articles were seized. On various occasions I was interrogated by the guerrillas both with respect to relations my daughter had with Israelis as well as the status of my husband who is a former officer in the United States Army. I was especially terrified when my daughter plaintiff Shira Finkelstein was interrogated by the guerillas at night. As a result of such threats of interrogation and the departure of various passengers at night, your deponent was fearful of sleeping and held herself in a constant state of readiness and attention watching the next move the hijackers might make. Threats were made against my daughter and myself by the guerrillas in the course of the aforesaid interrogations. I became fearful, suffering great harm to myself when the guerrillas informed us "that your country and the world does not care about you." I interpreted this as meaning that since the demands of the guerrillas were not being met, I and my daughter would be done away with by them.

9. We were caused to climb down steep ladders from the airplane in the stifling heat of the desert and on one of such occasions I injured my leg.

10. On the last day of our stay on the airplane, all of the passengers and crew were being evacuated with the exception of thirteen young women, including my daughter, plaintiff Shira Finkelstein. The guerrillas, prior to our evacuation, had made veiled threats to my daughter with respect to the day of evacuation from the plane. Furthermore, I had overheard the women guerrillas telling the men guerrillas to leave the girls alone. When the thirteen young girls were kept on the plane and all the other passengers and crew were asked to leave, I feared that my daughter and the other girls would be raped and blown up with the plane. I refused to leave the plane and stayed with my daughter and the young girls. The guerrillas then took myself and the young girls off the plane and, instead of putting us on buses with the other passengers, put us on board a Swiss Air

Lines plane which had also been hijacked. The passengers were then being evacuated from the Swiss Air Lines plane. When the Swiss crew was about to be evacuated, I told the Swiss captain that we were in danger, that when the crew would be evacuated the guerrillas would attack the girls and blow the plane up while the girls were still on board. The Swiss crew, unlike the TWA crew, refused to leave the airplane until the girls were evacuated. The guerrillas backed down and allowed the girls to leave the plane and we were then followed by the Swiss crew. We were then taken to Amman, brought to Cyprus and then returned home.

11. During the week-long period aboard the plane we were exposed to extreme hardships and forms of terror which resulted in injuries. We were exposed to extremes of desert heat during the daytime and intense cold during the evening without adequate clothing and blankets. Food and water were scarce and inadequate. Sanitary conditions, including toilets, were deplorable. Your deponent as well as her daughter were compelled to stay in their seats for many many long hours. A brief description of the injuries sustained are as follows: bruised leg as a result of jumping off truck or ladder; phlebitis in the leg; backache and stiff neck due to pinched nerve; loss of weight; loss of strength; feeling of nausea and terror throughout entire period of time which was debilitating and caused extreme feeling of weakness and nervous exhaustion; rashes due to inability to wash; as a result of the harrowing experience your deponent received treatment of various physicians and a psychologist for her feeling of persecution resulting from the hijacking. Your deponent cannot, in a short affidavit, describe fully her experiences during these seven days. Depositions, however, have been taken and annexed hereto as Exhibit "B" is a copy of the transcript of her examination before trial to set forth before the Court as fully as possible her experiences.

12. There are twenty-eight plaintiffs in this action. The deposition of only sixteen of these plaintiffs has been taken. Examinations before trial by defendant are extensive and time-consuming. Delay was involved in this case because the applicability of the Warsaw Convention, as modified by the Montreal Agreement, was uncertain as to hijacking. Companion cases were litigated both in the Federal and in the State Supreme Court, thus explaining the delay of six years which has ensued between the time of the hijacking incident and the time of the making of this motion. Your deponent seeks a severance because discovery is complete in her action. There is no issue of separate liability, only the question of damages and in the interests of justice the trial of the plaintiffs which are members of her family, that is, Shira Finkelstein, deponent's daughter, and deponent's husband Sidney J. Finkelstein, should proceed separately to completion. Otherwise, there will be an additional delay of many months before the deposition of the other twelve or more plaintiffs may be completed.

13. The physical manifestations of the injuries sustained by plaintiff are intertwined with the mental and nervous reaction to the sustained period of terror involved. Requested in this motion is a reconsideration of the New York Courts with respect to unnatural and anachronistic dichotomy created by the decision of the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc.* in differentiating between recovery for physical injury and concommitant mental injuries resulting from such physical injury and denial of recovery for so-called wholly mental injuries. With all due respect, such a determination by the New York Court of Appeals should not take place in the twentieth century. The basis in making this request for redetermination is the fact that the New York Court of Appeals was interpreting a Treaty of the United States of America and that the New York Court of Appeals, in part, was relying upon

dictum by Judge Harold R. Tyler of the United States District Court for the Southern District of New York in which Judge Tyler stated that mental injuries were not covered under the Warsaw Convention, as modified by the Montreal Agreement. Subsequent to the decision of the New York Court of Appeals in *Rosman, supra,* Judge Tyler, in a thirty-five page decision in which he fully examined the applicability of the Warsaw Convention as modified by the Montreal Agreement, held that mental injuries as such were clearly compensable. This decision has been followed by the United States District Court for the Central District of California in a decision of September of 1975. The present state of the law presents an anomaly: were we fortunate enough to have diversity of jurisdiction, recovery may be had for mental injuries in the United States District Court for the Southern District of New York, and if there is no diversity, then recovery may not be had. Such should not be the case and the decision of Judge Tyler, who is now the Deputy Attorney General of the United States, is commended to this Court in its consideration.

WHEREFORE, it is respectfully requested that this Court grant an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of plaintiffs, Sidney J. Finkelstein, individually and as natural guardian of Shira Finkelstein, and Ellen Finkelstein, and against defendant Trans World Airlines, Inc. on the issue of liability on the ground that there is no defense to said plaintiffs' cause of action; and further granting an order severing said plaintiffs' causes of action from the balance of this action, and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages and for such other and further relief as this Court may deem proper in the premises.

Affidavit of Ellen Finkelstein

s/ Ellen Finkelstein

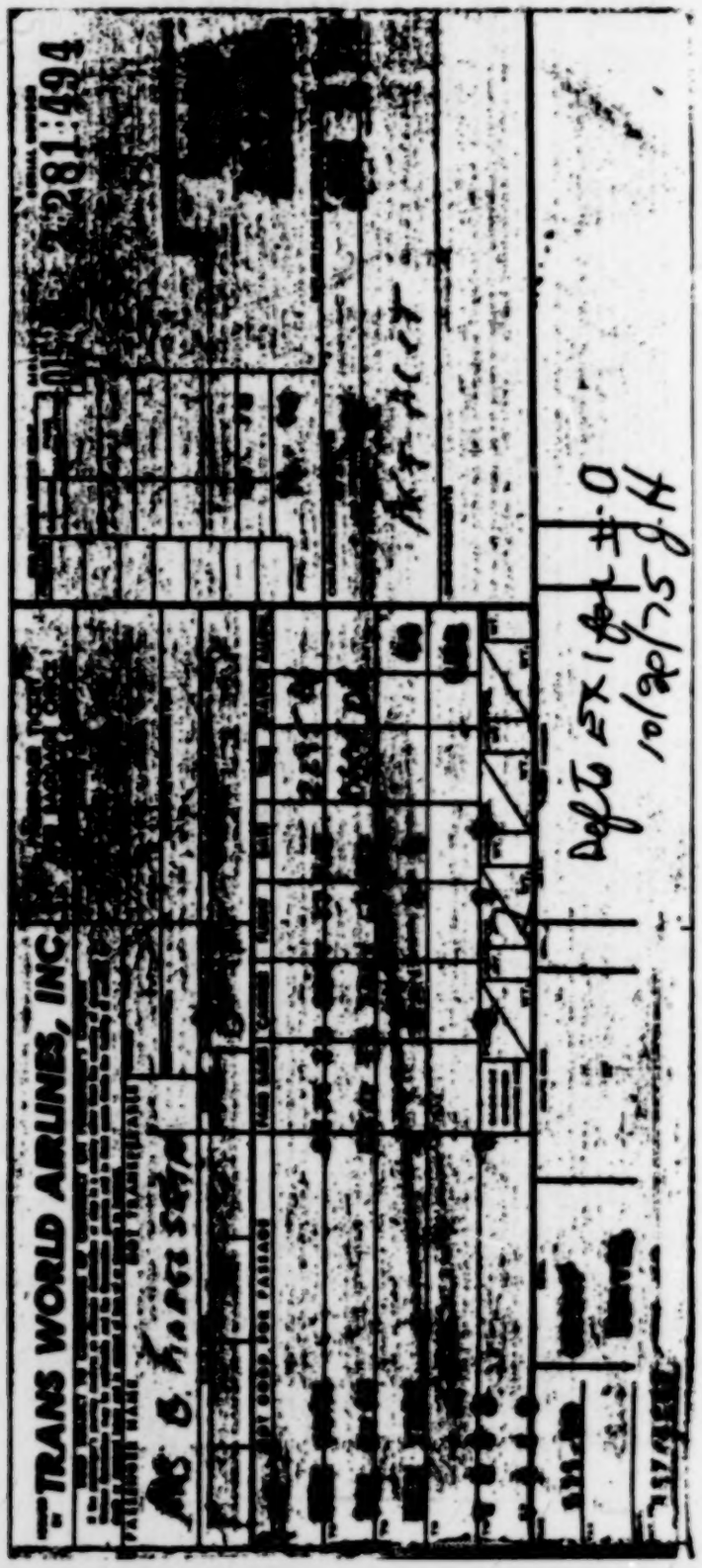
Ellen Finklestein

Sworn to before me this
12th day of May, 1976

s/ Sarah R. Morse
Notary Public

SARAH R. MORSE
NOTARY PUBLIC, State of New York
No. 31-8031600
Qualified in New York County
Commission Expires March 30, 1978.

ROUND-TRIP TICKET ISSUED BY TRANS WORLD AIRLINES TO PETITIONER ELLEN FINKELSTEIN



BEST COPY AVAILABLE

Round-trip ticket

AFFIDAVIT OF SHIRA FINKELSTEIN DANIEL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA, et al,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

STATE OF NEW YORK)
: ss :
COUNTY OF NEW YORK)

SHIRA FINKELSTEIN DANIEL, being duly sworn, deposes and says:

1. That she is one of the plaintiffs in the above entitled action; that she is a citizen of the United States of America, is presently twenty-three years of age and is now married and resides with her husband at 1239 49th Street, Brooklyn, New York; that her married name is Shira Daniel.

2. This affidavit is submitted in support of plaintiffs' motion for an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, and Ellen Finkelstein, and against defendant Trans World Airlines, Inc. (hereinafter referred to as "TWA")

on the issue of liability on the ground that there is no defense to the plaintiffs' cause of action, the defendant being absolutely liable under the Warsaw Convention as modified by the Montreal Agreement. Motion is further made for an order severing the foregoing named plaintiffs' causes of action from the balance of this action and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages for both "mental" and "physical" injuries and for further relief as this Court may deem proper in the premises.

3. On September 6, 1970, your deponent was a passenger for hire on defendant TWA's regularly scheduled Flight 741 proceeding from Tel-Aviv, Israel to New York, New York, with intermediate stops being made in Athens, Greece and Frankfurt, Germany, pursuant to a paid TWA ticket which provided for roundtrip air transportation between New York and Tel-Aviv. The ticket number was 015:492:281:495 issued by defendant Trans World Airlines. This ticket was produced as defendant's Exhibit "A" during the course of my deposition by defendant TWA and a copy was furnished to said defendant. The ticket is temporarily misplaced at the present time.

4. Your deponent was travelling with her mother, plaintiff Ellen Finkelstein. At the time that I made this trip I was seventeen (17) years of age. Shortly after the flight departed from Frankurt, Germany, on or about September 6, 1970, while the plane was in the air, I observed two armed men running up the aisle of the plane towards the cockpit. Soon afterwards I heard an announcement over the intercom of the plane. The plane had become hijacked. These individuals, at a later time, identified themselves as Members of the Popular Front for the Liberation of Palestine.

5. I became extremely frightened because I realized the plane would be diverted to an Arab country where, because I am

Jewish, my life would be in great danger. Throughout the duration of the flight, I feared that I would be shot or blown up by hand grenades carried by the hijackers.

6. Several hours later we were told that the plane would land in a desert area in the vicinity of Amman, Jordon. The plane landed with some difficulty in a dark, isolated area which consisted of an abandoned airfield used during World War II, named "Dawson Air Field." The landing took place in almost complete darkness and the landing field was lit by the light of torches or fires.

7. Your deponent was terrified as guerrillas armed with pistols and machine guns boarded the plane. Along with other passengers I was ordered to surrender my passport and move to another section of the plane. We were told that we were being held until certain demands on various countries, including the United States, were met.

8. I was forced to remain aboard the plane for approximately seven days during which time my freedom of movement was restricted and I was required to sit in my seat. My baggage was searched and my personal articles seized. On each of those occasions I was interrogated for an extended period of time while one of the hijackers held a knife at my throat and another stood behind me with a gun. I was questioned repeatedly as to the nature of my relationship with Israelis and my allegiance to Israel. I was told that I would be killed if I did not tell the truth. During the entire period of captivity my life was threatened by virtue of the restraint imposed upon me by the persons armed who at various times threatened me by pointing their weapons at me.

9. The hijackers made me especially afraid by their accusations that I was either an Israeli woman soldier, or

married to an Israeli soldier. They consistently interrogated me with respect to this subject.

10. After the crew and other passengers of TWA plane were directed by the hijackers to leave, I and my mother and twelve other girls were kept on the airplane. The circumstances are such that we believed we were to be raped and blown up with the airplane. We were then taken from the airplane to a Swiss Air Lines airplane but due to the interference of the Captain of the Swiss plane who refused to leave until I, my mother and the other girls were allowed to leave, we were finally put on buses and taken to Ammon, Jordon.

11. During my period of captivity, I sustained mental and physical injuries which were so interrelated that it was hard to distinguish, if it is at all possible, that which is mental or physical. I was exposed to extremes of desert heat during the day and intense cold in the evening without the protection of adequate clothing or blankets. I was exposed to unhealthy and disqusting sanitary conditions and it was absolutely impossible for me to wash myself. Food and water were scarce and inadequate. As a result of my physical and mental hardships during my captivity, I suffered severe headaches, dizziness, blurry vision with infection of the eyes and eyelids; I developed diarrhea and skin rash, pruritis, insomnia, earaches, muscle spasms in the areas of neck, shoulders and back, difficulty in walking and marked weakness in both of my legs, and concomitant with these ailments, I suffered severe depression, nervousness and became withdrawn. For my various ailments I have been treated by various doctors as well as a psychologist. The medical description of some of my conditions that I sustained is as follows: Blepheritis and conjunctivitis with secondary cellulitis of the face, infected lymphadenopathy of both axilla, maclo-papular rash of the extremeties, marked tenderness and spasm of the neck, shoulder and back muscles

with hyper reflexes thruout. I sustained the following: post traumatic blepheritis and conjunctivitis of the eyes with secondary skin infection, right sciatica and right jaw pain, weight loss and dehydration, subluxation of the temporal mandible joint, secondary lymphadenitis of both axilla, acute sprain and strain of the forsal and lumbar spine, bruxism causing pressure on temperil mandibular joints and insomnia. I also sustained a transient situational disturbance in the form of a traumatic neuroses.

12. It is impossible during the course of this affidavit to fully set forth the experiences sustained by your deponent. As further assistance to the Court, annexed hereto as Exhibit "A" is transcript of my deposition taken at an examination before trial in which my experiences are more fully set forth.

13. There are twenty-eight plaintiffs in this action. Deposition of only sixteen has been taken. The examinations before trial conducted by the defendant were extensive, time-consuming, subject to delays caused by the unavailability of counsel and the unavailability of witnesses. Further delay was encountered due to the fact that prior to lawsuits being brought against various airlines resulting from the hijacking of September 6, 1970, there was no precedent for establishing liability of the airlines under the Warsaw Convention modified by the Montreal Agreement. That liability has only been recently established by the New York Court of Appeals and by the various Federal courts where actions involving this hijacking have taken place. Furthermore, there was lacking precedent to establish the scope of injuries for which recovery may be had. Clarification of the law has been obtained in recent decisions in the United States District Court for the Southern District of New York and in the United States District Court for the Central District of California, the latter case being decided as late as September of 1975.

Affidavit of Shira Finkelstein Daniel

14. Discovery is complete in my action as well as in the action of my parents. There appears to be no reason why my action should not now proceed to trial for the assessment of damages and accordingly a severance of my action is sought from the balance of this action with the direction that my case proceed immediately to trial.

WHEREFORE, it is respectfully requested that this Court grant the motion of plaintiffs, Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, for an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of said plaintiffs on the issue of liability on the ground that defendant is absolutely liable to said plaintiffs and that there is no defense to the said plaintiffs' causes of action, and further for an order severing said plaintiffs' causes of action from the balance of this action, and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages including both physical and mental injuries, and for such other and further relief as to this Court may be proper in the premises.

s/ Shira Finkelstein Daniel
Shira Finkelstein Daniel

Sworn to before me this
12th day of May, 1976
s/ Sarah R. Morse

SARAH R. MORSE
NOTARY PUBLIC, State of New York
No. 31-8031600
Qualified in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF ALVIN H. MEADOW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT PALAGONIA, et al.,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Index No. 03189/72

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss :

ALVIN H. MEADOW, being duly sworn, deposes and says:

1. That he is an attorney and counselor at law duly admitted to practice in the Courts of the State of New York, and is a member of the firm of Delson & Gordon, Esqs., attorneys for plaintiffs herein, and as such is fully familiar with all proceedings heretofore had herein.

2. This affidavit is submitted in support of the motion of plaintiffs, Shira Finkelstein, Ellen Finkelstein and Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, for partial summary judgment pursuant to Rule 3212(e) of the CPLR on the ground that the defendant airlines is absolutely liable to said plaintiffs in accordance with the provisions of the Warsaw Convention as modified by the

Montreal Agreement, and further that an order should be entered severing said plaintiffs' actions from the balance of this action and further directing pursuant to Rule 3212(c) of the CPLR that this Court proceed to an immediate assessment of plaintiffs' damages, including both physical and mental injuries.

3. At the time this action was brought, Shira Finkelstein was a minor and thus the action was brought by her father as her guardian. Miss Finkelstein is now married, her married name is Shira Daniel and her minority no longer constitutes a disability and she may sue and does continue this suit in her own right.

4. On September 6, 1970, three airplanes were hijacked over Europe. A TWA airlines, a Swiss Air Lines plane and a BOAC flight. All these three planes were taken to Dawson Air field, an abandoned World War II air field in the desert of Jordan. Hijacking was much different than all of the numberous hijackings which had taken place prior to 1970. It was different in a very significant fashion in that for the first time the passenger victims of hijacking were subjected to a sustained period of terror and physical deprivation. Plaintiffs Ellen and Shira Finkelstein remained seven days as captives aboard a TWA airplane. Other passengers were held in capativity as long as twenty-eight days. The world was shocked and as a result of this hijacking, Congressional hearings were held and for the first time both the United States Government and the airlines in question instituted serious security procedures. The institution of these security procedures was induced, it is believed by your deponent, in large part by the fact that the three airplanes were blown up by the hijackers resulting in substantial property damage losses for the airlines and the insurance companies involved and further numerous suits have been brought by passengers seeking recovery for absolute liability based on the hijacking.

5. For some period of time several cases companion to the present one have been litigated both in the State and Federal Courts, thus explaining the delay of almost six years since the date of the hijacking. These companion cases have established that the defendant airline TWA has absolute liability to the plaintiffs who had engaged in an international flight between Tel-Aviv, Israel, and New York, New York via Athens, Greece, and Frankfurt, Germany. There has been and still is a dispute as to the scope of the permissible recovery to the plaintiffs. Judge Harold R. Tyler, the United States District Court Judge for the Southern District of New York has held that the plaintiffs, if the action were brought in his Court, would be entitled to recover for so-called mental injuries as well as physical injuries. Judge Tyler is now the Deputy Attorney General of the United States. The decision of Judge Tyler has been concurred in by another United States District Court for the Central District of California. The New York Court of Appeals, however, has limited in a companion case the right of plaintiffs to recover for mental injuries. An unfair situation has thus developed. If there is diversity of citizenship, the action may be brought at 30 Centre Street, New York, New York, the address of the United States District Court for the Southern District of New York. If diversity is lacking, as is the case with respect to plaintiffs, the action could have been brought at 60 Centre Street, New York, New York, in the Supreme Court, New York County, which is across the street from the Federal Court. Yet the law with respect to the application of the United States Treaty would be totally different in a very substantial way. Both plaintiffs Shira Finkelstein and Ellen Finkelstein were treated for mental injuries as a result of this hijacking by psychologists. It may very well be that under the New York Court of Appeals decision, as it presently stands, these plaintiffs may not be able to recover for such treatment. Yet it is clear that in the United States District Court for the Southern District of New York recovery may be had for the condition so treated. Your deponent must state that

the position of the New York State Courts as presented by the New York Court of Appeals constitutes a philosophy of life and jurisprudence which reflects a state of knowledge that existed prior to the time of the Philosopher Maimonides. It was he who brought to the attention of the Middle Ages the fact that man must be considered as a whole and there can be no dichotomy between one's mental status and one's physical status. But even more important, the New York Court of Appeals in reaching its decision in the *Rosman* case relied upon a statement by Judge Tyler in a prior decision which was dictum to the effect that there was no recovery for mental injuries under the Warsaw Convention. Judge Tyler, when confronted with the issue on the merits, in a thirty-five page opinion set forth in a number of ways why recovery should be had for mental injuries under the Warsaw Convention as modified by the Montreal Agreement.

6. It is asked that this Court reconsider the scope of recovery under the Warsaw Convention as modified by the Montreal Agreement and concur with Judge Tyler that the plaintiffs are entitled to recover for mental injuries.

7. As a result of the uncertainty in the law, discovery was not had for a period of time. In addition, discovery has been delayed due to the unavailability of counsel and of the parties to complete the depositions of all the plaintiffs. Defendant has insisted that it wishes to take the deposition of other plaintiffs in the action before the case may be placed on the calendar. There are only sixteen of the plaintiffs who have been examined and twelve yet to go. All that remains in each of the cases is the determination of damages. There seems to be no basis for judicial economy to have all the plaintiffs tried together in view of the fact that they all have different damages. Furthermore, to have twenty-eight plaintiffs in a single case might constitute an unfair burden for a jury who might have to sit for an extraordinary length of time. Deponent sees no reason why these

plaintiffs' case should not be severed from the balance and that they proceed immediately to trial for assessment of damages.

8. For the further information of the Court with respect to the injuries sustained by the plaintiffs, I annex as Exhibit "A" hereto copy of plaintiffs' Bill of Particulars together with copies of medical bills and medical reports.

WHEREFORE, it is respectfully requested that this Court grant the motion of plaintiffs, Ellen Finkelstein, Sidney J. Finkelstein, individually and as father and natural guardian of Shira Finkelstein, for an order pursuant to Rule 3212(e) of the CPLR granting partial summary judgment in favor of said plaintiffs on the issue of liability on the ground that defendant is absolutely liable to said plaintiffs and that there is no defense to the said plaintiffs' causes of action, and further for an order severing said plaintiffs' causes of action from the balance of this action, and for a further order pursuant to Rule 3212(c) of the CPLR directing an immediate trial to assess plaintiffs' damages including both physical and mental injuries, and for such other and further relief as to this Court may be proper in the premises.

s/ Alvin H. Meadow
Alvin H. Meadow

Sworn to before me this
12th day of May, 1976

s/ Sarah R. Morse

SARAH R. MORSE
Notary Public, State of New York
No. 31-8031600
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT ANNEXED TO AFFIDAVIT OF ALVIN H. MEADOW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT — VERIFIED BILL OF PARTICULARS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ELLEN FINKELSTEIN, et al.,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.,

Defendant.

Plaintiff Ellen Finkelstein for her bill of particulars for injuries alleges as follows:

1. Plaintiff Ellen Finkelstein sustained injuries on a cumulative basis during the period of September 6, 1970 through September 12, 1970.

2. The injuries sustained by plaintiff Ellen Finkelstein affected and were located in all of plaintiff's mind and body.

3. Plaintiff sustained injuries as a result of being held in captivity as a hostage aboard the TWA aircraft and in other parts of Jordan. Plaintiff sustained great fear of bodily harm and loss of life and was made to experience bodily injury, pain, grief, anguish, fear, hunger, dehydration and thirst as a result of being held in captivity under unhygenic and unsanitary conditions with inadequate shelter, heat at night, food and water and with inadequate medical attention. During daytime plaintiff was exposed to great heat and high humidity. Threats were made to plaintiff's life and plaintiff was caused to suffer personal

indignities and to have plaintiff's personal liberty and freedom restrained. As a result of being held in captivity plaintiff has developed a fear of loud noises, experiences nightmares while asleep, feels an unexplainable nagging sensation of fear and is frightened in close places. Plaintiff sustained a weight loss of 12 pounds while held in captivity. Plaintiff was fatigued, anxious, irritable and nervous. A physical examination of plaintiff subsequent to the hijacking incident revealed the following: a very nervous person with areas of ecchymosis and purpura on both lower extremeties with numerous bruises and contusions over the body. Plaintiff was very apprehensive with palpitations and tacchydardia. Plaintiff complained of constant insomnia and nightmares, difficulty in eating and a weight loss of 12 pounds. Plaintiff was suffering from post traumatic bilateral thrombophlebitis of both legs and thighs, chronic nervousness and palpitations of the heart, numerous bruises and contusions and areas of ecchymosis over the body and dehydration and weight loss. Plaintiff was placed on complete bed rest and supportive medical therapy for the next three weeks and was confined to the house for another week. Plaintiff sustained as a result of the trauma of the hijacking incident a debilitating, disabling and severely acute anxiety neuroses.

4. Plaintiff contends that the defendant, its officers, agents and employees failed to take adequate security precautions which a reasonable man under the circumstances would have taken to prevent hijacking of the passengers of TWA Flight 741 entrusted to its care and the airplane in which such passengers were proceeding. The plaintiff contends that the defendant, primarily responsible for the safety of the said plaintiff while a passenger aboard TWA Flight 741, further failed to take such necessary steps as required by law as would ensure that others obligated to take security precautions to prevent hijacking in fact took such necessary precautions.

Exhibit Annexed to Affidavit of Alvin H. Meadow

5. Plaintiff claims both actual and constructive notice of the treat of actual hijacking by Arab Guerrilla groups and further constructive notice of the prevalence of the possibility of hijacking attempts.

6. Upon information and befief it is contended that notice to the defendant of the threat of hijacking was received by the defendant from El Al Airlines, INTER-POL, airport authorities and other sources shortly before and prior to the time defendant's airplane left the Frankfurt airport on September 6, 1970.

7. The plaintiff has sustained permanent injury in the form of a feeling of unexplained fear of confined spaces, loud noises, insomnia, nightmares and fear of flying in airplanes. Plaintiff suffers from post traumatic bilateral thrombophlebitis of both legs and thighs, chronic nervousness and palpitations of the heart, numerous bruises and contusions and areas of ecchymosis over the body. Plaintiff is still suffering from a debilitating, disabling and severly acute anxiety neuroses caused by the trauma of the hijacking incident.

8. Plaintiff was confined to house and home by doctors orders for a period of one month subsequent to returning home from the hijacking incident. She may have left the house on occasion when absolutely necessary.

9. Plaintiff has been incapacitated from her employment as a registered representative for stock exchanges for a period of approximately one year to date.

Exhibit Annexed to Affidavit of Alvin H. Meadow

10. Plaintiff claims special damages as follows:

Physicians Services	$ 1,410
Drugs	50
Loss of time from Employment	14,000
	$15,460

Former employer:

Burnham & Company
60 Broad Street
New York, New York

EXHIBIT ANNEXED TO AFFIDAVIT OF ALVIN H. MEADOW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT — VERIFIED BILL OF PARTICULARS

Plaintiff Sidney J. Finkelstein for his bill of particulars for loss of services and loss of society and companionship of his wife.

1. Lost society and companionship of wife for a period of one week.

2. Relationship between husband and wife has become strained due to afflictions of wife enumerated above.

3. Plaintiff contends that the defendant, its officers, agents and employees failed to take adequate security precautions which a reasonable man under the circumstances would have taken to prevent hijacking of the passengers of TWA Flight 741 entrusted to its care and the airplane in which such passengers were proceeding. The plaintiff contends the defendant, primarily responsible for the safety of the said plaintiff while a passenger aboard TWA Flight 741, further failed to take such necessary

steps as required by law as would ensure that others obligated to take security precautions to prevent hijacking in fact took such necessary precautions.

Sidney J. Finkelstein as father and natural guardian of Shira Finkelstein for her bill of particulars for injuries alleges:

1. The plaintiff sustained injuries on a cumulative basis durint the period of September 6, 1970 through September 12, 1970.

2. The injuries sustained by plaintiff Shira Finkelstein affected and were located in all of plaintiff's mind and body.

3. Plaintiff sustained injuries as a result of being held in captivity as a hostage aboard the TWA aircraft and other parts of Jordan. Plaintiff sustained great fear of bodily harm and loss of life and was made to experience bodily injury, pain, grief, anguish, fear, hunger, dehydration and thirst as a result of being held in captivity under unhygenic and unsanitary conditions with inadequate shelter, heat at night, food and water and with inadequate medical attention. Threats were made to plaintiff's life and plaintiff was caused to suffer personal indignities and to have plaintiff's personal liberty and freedom restrained. As a result of being held in captivity plaintiff has developed a fear of loud noises, experiences nightmares while asleep, feels an unexplainable nagging sensation of fear and is frightened in close places. Plaintiff sustained a weight loss of 15 pounds while held in captivity. Plaintiff was fatigued, anxious, irritable and nervous. She suffered from severe headaches, dizziness, blurry vision with infection of the eyes and eyelids. She developed diarrhea and skin rash over her extremeties. She still complains of pruritis, insomnia, earaches, generalized muscle spasms involving her neck, shoulder and back. She has difficulty in bending and walking, has marked weakness of both legs and feet and sustained a 15 pound weight loss. A physical examination of

plaintiff revealed: Blepheritis and conjunctivitis with secondary cellulitis of the face, infected [illegible]phadenopathy of both axilla, maclo-papular rash of the extremeties, marked tenderness and spasm of the neck, shoulder and back muscles with hyper reflexes thruout. Plaintiff sustained the following: post traumatic blepheritis and conjuctivitis of the eyes with secondary skin infection, right sciatica and right jaw pain, weight loss and dehydration, subluxation of the temporal mandible joint, secondary lymphadenitis of both axilla, acute sprain and strain of the forsal and lumbar spine, bruxism causing pressure on temperil mandibular joints and insomnia. She sistained a transient situational disturbance in the form of a traumatic neuroses.

4. Plaintiff contends that the defendant, its officers, agents and employees failed to take adequate security precautions which a reasonable man under the circumstances would have taken to prevent hijacking of the passengers of TWA Flight 741 entrusted to its care and the airplane in which such passengers were proceeding. The plaintiff contends that the defendant, primarily responsible for the safety of the said plaintiff while a passenger aboard TWA Flight 741, further failed to take such necessary steps as required by law as would ensure that others obligated to take security precautions to prevent hijacking in fact took such necessary precautions.

5. Plaintiff claims both actual and constructive notice of the threat of actual hijacking by Arab Guerrilla groups and further constructive notice of the prevalence of the possiblility of hijacking attempts.

6. Upon information and belief it is contended that notice to the defendant of the threat of hijacking was received by the defendant from El Al Airlines, INTER-POL, airport authorities and other sources shortly before and prior to the time

defendant's airplane left the Frankfurt airport on September 6, 1970.

7. The plaintiff has sustained permanent injury in the form of a feeling of unexplained fear of confined spaces, loud noises, insomnia and nightmares. Plaintiff suffers from post traumatic belpheritis and conjunctivitis of the eyes with secondary skin infection, right sciatica and right jaw pain, subiuxation of the temporal mandible joint, secondary lymphadenitis of both axilla, acute sprain and strain of the forsal and lumbar spine, bruxism causing pressure on temperil mandibular joints and insomnia.

8. Plaintiff was confined to bed and house for approximately one month after returning home from the hijacking incident on doctors orders. On occasion where required she left the house during that period.

9. Plaintiff could not attend one month of the school term at college. She could not attend a school to be certified as a hebrew teacher as a result of her afflictions. If she attended she would have been certified to teach hebrew school this year.

10. Plaintiff claims special damages as follows:

Physicians Services	$ 830
Drugs	50
Loss of time from teaching this year approximately	2,000
	$ 2,880

Dated: New York, New York
November 5, 1971

Yours, etc.,

DELSON & GORDON
Attorneys for Petitioners
230 Park Avenue
New York, New York 10017
Tele: 686-8030

TO:

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Defendant
25 Broadway
New York, New York 10004

EXHIBIT ANNEXED TO AFFIDAVIT OF ALVIN H. MEADOW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT — LETTER FROM ARTHUR TEICHER, Ph.D.

ARTHUR TEICHER, Ph.D.
215 W. 88th Street
New York, N.Y. 10024

SU 7-2534

January 25, 1971

CONFIDENTIAL

Re:
Mrs. Gabby Finkelstein
16-92 52 Street
Brooklyn, N.Y., 11204

To Whom It May Concern:

Mrs. Finkelstein consulted me on October 2, 1970. She complained that she was anxiety laden, agitated, subject to

crying spells and bouts of depression. She had been a passenger on a plane that was hijacked by Arab guerrillas and detained in Jordan for several weeks.

While a prisoner on the plane she was generally in control of herself for her "daughter's sake". (Her 17 year old daughter was on the plane with her). The weeks following release she was "covered by a numbness and a sense of unrealness". "I could not even recall the anguish I felt when they pointed a gun at my daughter and me as they took us off the plane. That was the night the regular army surrounded us. They said they were going to shoot us if the army molested them".

As her feelings and memories returned prodded by the questions and discussions of relatives and friends, the feelings of numbness disappeared and in its place waves of rage and anxiety swept over her. She then began to worry that she or her daughter would be kidnapped and tortured for saying "bad things about the Arabs to newspapermen". She watched the mail for blackmail letters. If her daughter were delayed in returning from school she would become extremely agitated envisioning "the worst". Before going to bed, she would check the house to see that no one had broken in or was lying in wait for them. She cannot explain her anxiety. She knows it is irrational after the anxiety has become dissipated, but she is pervaded by a sense that "nothing is the same anymore".

Her anger is attached to memories of "Being constantly tortured with threats of being blown up", "having lights flashed into our eyes every five minutes at nite", "having your freedom taken away and every move and action you take becomes incriminating", and a dread that they would separate her from her daughter. She recalls becoming obsessed on the plane if it would be better for Shira if she, rather than Shira, would be shot first. As the weeks went by, Mrs. Finkelstein began to

transfer her anxiety from the memories of the hijacking to daily life situations. She became over-concerned in the trivia of daily life events that touched upon the lives of both her daughter and her son. She found herself nagging her husband without reasonable cause or justification. She questioned herself, but could not control her compulsive impulses.

Mrs. Finkelstein had been in treatment with me from May, 1958 to May, 1964 for a severely disabling phobic condition. At the termination of therapy Mrs. Finkelstein had completely recovered from her neurotic state. The current traumatic experience did not exacerbate her old condition. However, she does require treatment to cope with the debilitating and disabling effects of a severely acute anxiety neuroses that was precipitated for her by the current trauma.

Mrs. Finkelstein is being treated by me on a once-a-week basis for her condition.

Respectfully yours,

s/ Arthur Teicher Ph.D.
ARTHUR TEICHER, Ph.D.

AT:sr

EXHIBIT ANNEXED TO AFFIDAVIT OF ALVIN H. MEADOW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT — LETTER FROM GEORGE LEVINE, M.D.

GEORGE LEVINE, M.D.
50 Maple Street
Brooklyn, N.Y.
•
Ingersoll 2-6462

August 9, 1971

Delson and Gordon
230 Park Avenue
New York, New York

To whom this may concern:

Shira Finkelstein, of 1692 52nd Street, Brooklyn, New York, who was hijacked in a TWA plane September 6, 1970, has been under my care for Blepharoconjunctivitis.

She was treated with topical antibiotics on 10/14, 10/21, and 12/2 1970.

Total fees obtained: $75.00.

s/ George Levine

George Levine, M.D.F.A.C.S.

Order and Agreement

CERTIFIED COPY OF ORDER NO. E-23680 AND COUNTERPART AGREEMENT

[Certified by C.A.B. on December 16, 1976]

Order No. E-23680

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 13th day of May, 1966

Agreement Relating to Liability
Limitations of the Warsaw
Convention and the Hague Protocol

Docket 17325
Agreement C.A.B. 18900

ORDER APPROVING AGREEMENT

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over ninety countries likewise became parties to the Convention.[1] On November 15, 1965, the United States Government gave notice of denunciation of the Convention,

1. The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon six months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's Economic Regulations and assigned the above designated C.A.B. number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under

Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the United States Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability

for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 412 thereof:

IT IS ORDERED THAT:

1. Agreement C.A.B. 18900 is approved.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government.

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955."

However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention, or said Convention as amended by said Protocol, which according to the contract of carriage includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of U.S. $75,000 inclusive of legal fees and costs except that, in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol. Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention or the Convention as amended by the Hague Protocol and by the special contract described in Paragraph 1, the following notice, which shall be printed in type as least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket, (ii) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket, or (iii) on the ticket envelope:

> "Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of (Name of Carrier)* and (certain other carriers)*

* See 2A.

> parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the Carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $8,290 or U.S. $16,580.
>
> The names of Carriers parties to such special contracts are available at all ticket offices of such Carriers and may be examined on request.
>
> Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the Carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

2A. The expression (Name of Carrier) and (certain other carriers) may be replaced by the expression "Certain Carriers" in above notice.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

Order and Agreement

4. This Agreement may be signed in any number of counterparts all of which shall constitute one Agreement. Any carrier engaged in carriage to which the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol applies may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

TRANS WORLD AIRLINES, INC.

By (illegible)
Vice President and
General Counsel

Supreme Court, U. S.
FILED
SEP 21 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 77-105

ROBERT PALAGONIA, et al.,

Plaintiffs,

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ALVIN H. MEADOW
Attorney for Petitioners
230 Park Avenue
New York, New York 10017

Of Counsel:
DELSON & GORDON
PIERRE F. de RAVEL d'ESCLAPON

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In The

Supreme Court of the United States

October Term, 1976

No. 77-105

ROBERT PALAGONIA, et al.,

Plaintiffs,

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The respondent suggests that the Court does not have jurisdiction at this time because recovery may be obtained at the damage hearing for so-called physical injuries in the sum of $75,000 per plaintiff passenger, and thus theoretically the trial court would not be able to consider plaintiffs' further claims for mental anguish and mental injuries alone. The respondent is

disingenuous in making such contention to the Court because throughout all settlement discussions, both before the state court and in private, its offers of settlement have never exceeded several thousand dollars per passenger. Furthermore, it is quite obvious that it is an unnecessary burden on the Court and the parties to hold the damage trial twice just because such trial was not held under the proper substantive law of damages. Quite clearly, this case is ripe for review.

It is further suggested by the respondent that the Court should take no action and deny *certiorari* because in effect the obvious injustice resulting from denial of mental injuries alone by the state court would be corrected with respect to possible future claimants by the action of the United States Senate in ratifying Montreal Protocols 3 and 4 which revised the Warsaw Convention. The Senate Foreign Relations Committee in executive session on September 20, 1977 has deferred action on the Montreal Protocols 3 and 4 *sine die.*

The said Protocols purport to revise Paragraph 1 of Article 17 of the Warsaw Convention in both the French and English official versions in the same manner as did the Guatemala Protocol. See page 18 of petitioners' brief for text of such revision. It is noted that the French phrase "lesion corporelle," which is set forth in both the present official French text of the first paragraph of Article 17 of the Warsaw Convention is also contained in the official French text of the first paragraph of Article 17 as revised by the proposed Montreal Protocols 3 and 4. In the official English version of the first paragraph of Article 17 as revised by Montreal Protocols 3 and 4, the phrase "lesion corporeile" is translated by the phrase "personal injury"; whereas in the unofficial English translation of the existing first paragraph of Article 17 of the Warsaw Convention such phrase is translated as "bodily injury."

On July 26, 1977, hearings were held before the United States Senate Foreign Relations Committee with respect to the

ratification of the said Montreal Protocols 3 and 4. Submitted to the Senate Committee on Foreign Relations was a detailed "ARTICLE BY ARTICLE ANALYSIS" of the said proposed revisions to the Warsaw Convention. With respect to the change in translation of the phrase "lesion corporelle" from "bodily injury" to "personal injury" the following explanation was given:

> "The words 'personal injury' replace the phrase 'wounding . . . or any other bodily injury' in order to clarify the modern meaning of the French text. *See, e.g., Krystal v. British Overseas Airways Co.,* 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.,* 388 F. Supp. 1238 (S.D.N.Y. 1975) (awarding damages for mental anguish alone)." *DETAILED REPORT The Warsaw Convention as revised by Montreal Protocols 3 and 4* dated June 25, 1977, "ARTICLE BY ARTICLE ANALYSIS" at pages 11 and 12.

This report was prepared by: Paul B. Larsen, of the Office of General Counsel of the Department of Transportation; Bruce I. Selfon, Assistant Chief Counsel, Federal Aviation Administration, Department of Transportation; and Frank Willis (Chairman), Assistant Legal Advisor for African Affairs, Department of State. Other members of the United States delegation to the International Civil Aviation Organization whose work is summarized by the Report are representatives of the Civil Aeronautics Board, Air Transport Association and Treasury Department.

At the July 26, 1977 hearing before the United States Senate Foreign Relations Committee, Herbert J. Hansell, Legal Adviser, Department of State, submitted a written statement on behalf of the United States State Department concerning ratification of Montreal Protocols 3 and 4. He stated at page 7 of his written statement the following:

> "In almost every respect, these provisions of the Guatemala Protocol represent an agreement by the international aviation community to terms requested by the United States to up-date the Warsaw Convention."

The above quoted statement in the "ARTICLE BY ARTICLE ANALYSIS" explains that the words "personal injury" are being used in the official English version rather than "bodily injury" as contained in the former unofficial English version in order to clarify the text of the Treaty so as to make it conform with the proper existing construction of the law. Thus, the proposed change in text is not for the purpose of altering the substantive rights of the parties under such law, but rather to make clear the rights that passengers already have under the law. The change is thus declaratory of existing law; and if these Protocols to the Warsaw Convention are indeed ratified, their effect will be retrospective and not prospective as suggested by the respondent. See *Girard Inv. Co. v. Commissioner of Internal Revenue*, 122 F.2d 843, 846 (3d Cir. 1941), *cert. denied*, 314 U.S. 699, 62 S. Ct. 479 (1941) where Judge Clark writing for the Court stated the following with respect to the retrospective application of declaratory amendments of statutes:

> "If the existing is obscure anything subsequent can be interpreted either as a clarification or as a change. If the former, the effect is retrospective and therefore to be eschewed. It can, of course, be so stated and if it is, governs. One might prescribe this the *sine qua non*. In any event, caution has been indicated:
>
> 'Statutory construction is often aided by a consideration of later enactments which may clarify doubt as to the meaning of the earlier statute or correct manifest error in its administration. No rule of construction needs

> more careful application. Ordinarily, the deliberate selection of language differing from the language of previous acts indicates an intended change of the law. But no change may be intended; the later statute may be declaratory of the meaning of the previous law or a codification, or *recognition of a contemporaneous construction, crystallizing it into statutory law; it may be a clarification of an earlier act.*'" (emphasis added).

See also *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 90, 79 S. Ct. 141, 145 (1958).

Thus, it is the policy of the United States Government to provide for mental injuries alone under existing law. This submission by the representatives of the Executive Departments directly responsible for the implementation of the provisions of the Warsaw Convention, as modified by the Montreal Agreement, for the first time explains the change of language contained in the official English version of the Guatemala Protocol. It is submitted that this Court should support the construction of these Executive Departments. See *Factor v. Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191 (1933).

Respondent's conclusion that the legislative history of Article 17 of the Warsaw Convention demonstrates that the drafters did not intend that there be recovery for fright or psychic trauma alone is a *non sequitor*. There is no explanation given in any of the convention proceedings for this change in the drafts. The court in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974), relied upon by the state court herein, clearly pointed out at pages 395, 854 of its decision that the legislative history was not supportive of the construction contended for by the respondent.

Furthermore, the reference to the statement of Juglart by

respondent at pages 8-9 of its brief is not correct. The correct translation of Juglart's statement is as follows:

> "It is regrettable, on the other hand, that no distinction is made between incapacities total or permanent and simple injuries, wounds or partial incapacities. Mental injury should even be the object of a special mention." (Juglart, *Traite Elementaire de Droit Aerien,* 330 (1952)).

Juglart obviously was considering better draftsmanship and did not mean to convey a conclusion that mental injuries alone were not recoverable. Juglart was not a member of the original drafting committee of the Warsaw Convention. However, Judge Otto Riese, whose writings indicating that mental injuries alone are recoverable referred to at pages 58-59 of the petition herein, was the German delegate to the 1929 Warsaw Convention.

The above stated position of the United States Government as to existing law has caused the petitioners herein to move for reargument in the state court of the denial of the petitioners' right to appeal to the New York Court of Appeals. Decision on such motion for reargument is pending, and it is requested that the Court defer decision on this petition pending decision of the state court on the motion.

CONCLUSION

It is submitted that the Warsaw-Montreal Regime provides recovery for mental injuries alone to the extent that such recovery is otherwise available in the State of New York. It is requested that the Court defer decision on this petition until such time that the motion for reargument of the denial of petitioners leave to appeal to the New York Court of Appeals is decided by the Appellate Division of the State of New York. And in the event that such leave is again denied, that this Court grant the petition for writ of certiorari. It is further requested, that the Court defer decision on the petition pending the receipt by the Court of a motion by the American Trial Lawyers Association to file an *amicus curiae* brief in support of the petition for writ of certiorari herein.

Respectfully submitted,

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Of Counsel

September, 1977

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1976

No. 77-105

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1976

No. 77-105

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

Respondent, Trans World Airlines, Inc. ("TWA"), respectfully submits this brief in opposition to petitioners' request for review of a non-final order of an intermediate New York State appellate court.

Jurisdiction

As discussed below, this Court does not have jurisdiction because the non-final order is not a final judgment or decree, 28 U.S.C. §1257(3).

Questions Presented

1. Is this non-final order a final judgment pursuant to 28 U.S.C. §1257(3)?

2. If this Court has jurisdiction should it grant review at this time?

3. Under the Warsaw Convention and Montreal Agreement imposing strict liability on an air carrier in international transportation for "death, wounding or other bodily injury," may a passenger recover for fright or psychic trauma alone?

Statement

Petitioners were on board TWA's plane scheduled to fly from Tel Aviv, Israel to New York on September 6, 1970 when it was hijacked by members of the Popular Front for the Liberation of Palestine to a desert airport near Amman, Jordan. (Pet. App. 22a-23a).[1] With the exception of periods outside and near the aircraft for purpose of exercise, petitioners spent most of their time on the plane either walking around or in their seats (Pet. App. 23a). On September 12, petitioners and the other passengers were permitted to leave the plane and complete their journey to New York.

As were other passengers on the plane during the hijacking, petitioners were discomforted by the heat during the day and the cold at night, the shortage of food and water, and the overused toilets (Pet. App. 25a). As did others, petitioners complained of backaches, stiff necks,

[1] References marked Pet. App. are to petitioners' appendix annexed to the Petition.

rashes, weight loss, nausea and, in addition, the fright or psychic trauma alone which was experienced during the hijacking but which neither was a consequence of, nor resulted in, any bodily injury (Pet. App. 25a).

Other passengers on the plane, the Rosmans, also sued TWA in the New York State courts and moved for partial summary judgment, claiming that TWA was absolutely liable under the Warsaw Convention, 49 Stat. 3000, T.S. 876, and the Montreal Agreement of 1966 (Agreement CAB 18900, 31 Fed. Reg. 7302).[2]

Article 17 of the Warsaw Convention provides:

> "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The carrier's liability was made absolute by the Montreal Agreement, except where contributory negligence is shown, to the extent of a maximum of $75,000 per passenger (Pet. App. 57a).

New York's highest court granted summary judgment to the Rosman plaintiffs on the issue of TWA's liability stating:

> "[P]laintiffs should be allowed to prove damages for palpable, objective bodily injuries suffered, whether caused by psychic trauma or by the physical conditions on the aircraft, irrespective of impact, but not for psychic trauma alone." *Rosman* v. *Trans*

[2] Both the Convention and the Agreement are set forth at 49 U.S.C. 1502 note.

World Airlines, Inc. 34 N.Y.2d 385, 388, 314 N.E.2d 848, 850 (1974).

• • •

"It follows that, if proved at trial, she should be compensated for her mental anguish, *suffered as a result* of the rash, since this anguish would have flowed from the 'bodily injury'." *Id.* at 399, 314 N.E.2d at 856-857 (emphasis in original).

Pursuant to *Rosman,* therefore, TWA is strictly liable and must compensate petitioners for any bodily injuries, including bodily injuries caused by the fright or psychic trauma of the hijacking. In addition, TWA is strictly liable for any damages flowing from any bodily injury, such as pain and suffering or mental anguish. *Id.* at 399-400, 314 N.E.2d at 857.[3]

Petitioners are not content with this result and seek to hold TWA strictly liable for fright or psychic trauma alone which they claim they experienced during the hijacking even though this fright neither caused any bodily injury nor flowed from any bodily injury.

The Proceedings Below

Petitioners moved in the New York trial court for an order that at trial they could be compensated, in addition to any bodily injuries, for the fright or psychic trauma alone of being on a hijacked plane. They cited as support a federal district court decision, *Husserl* v. *Swiss Air Transport Co.,* 388 F. Supp. 1238 (S.D.N.Y. 1975).[4] The trial court denied their motion ordering that recovery for mental injuries could be had only to the extent permitted by *Rosman, supra,* and that petitioners could not recover at trial for fright or psychic trauma alone (Pet. App. 11a). The Appellate Division affirmed the trial court (Pet. App. 6a), and denied petitioners leave to appeal this non-final order to the New York Court of Appeals (Pet. App. 1a-2a). Petitioners now request this Court to review the order of the Appellate Division.

[3] Page 60 of the Petition refers to Riese & Lacour, Précis de Droit Aérien (1951), at p. 264, who state that the Warsaw Convention should be applicable to "the *consequences* of psychic trauma." (Emphasis added.) This position is no different from that of the court in *Rosman* quoted above, 34 N.Y.2d at 388, 314 N.E.2d at 850. Petitioners are not content to recover for the consequences of psychic trauma. They wish to recover for fear or psychic trauma alone.

REASONS FOR DENYING THE WRIT

I. This Court Does Not Have Jurisdiction

As stated in 28 U.S.C. Section 1257 "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court. . . ." The non-final order below does not fit any of the exceptions to the final judgment rule, and this Court should not grant certiorari at this time. The four exceptions to the final judgment rule discussed in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), do not apply to this case:

1. The outcome of the damage trial is not preordained. Petitioners might be awarded the maximum recovery allowed under the Convention, $75,000 per

[4] This decision, Husserl II, was never appealed. A previous decision in the same court, construing different language in the Warsaw Convention, determined that a hijacking constituted an "accident" within the meaning of the Convention. *Husserl* v. *Swiss Air Transport Co.,* 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam,* 485 F.2d 1240 (2d Cir. 1973) ("Husserl I"). Husserl I, a non-final order, was appealed to the Second Circuit pursuant to 28 U.S.C. §1292(b). Thereafter, the parties discovered a different federal question which resulted in Husserl II.

passenger, or be satisfied with some lesser amount. In either case, no reason to assert additional damage claims would necessarily impel them into this Court. The federal issue might be mooted.

2. For the reasons expressed in subparagraph 1, above, the federal issue may not necessarily survive regardless of the future state proceedings.

3. Petitioners may still seek certiorari if they are dissatisfied with the result of the state damage trial; the federal issue will not *necessarily* be mooted.

4. Finally, review of the case at this time would not preclude a state court damage trial. No serious erosion of any federal policy is likely to occur if this Court does not grant an immediate review (*Cox* at 482-3).

There is no record describing the precise damages. This case is not ripe for review (28 U.S.C. §1257(c)).

II. The Non-Final Order Below Does Not Conflict With the Decision of Any Court of Appeals

The court below and the New York Court of Appeals in *Rosman* are the only appellate courts to have interpreted the words at issue, "death or wounding of a passenger or any other bodily injury suffered by a passenger . . ." (Warsaw Convention, 49 Stat. at 3018). The four circuit court decisions cited by petitioners as creating a "significant conflict" (Petition p. 25), *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Martinez Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1592 (1977); *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977); and *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.),

cert. denied, —— U.S. ——, 97 S.Ct. 2939 (1977), are all inapposite. In those cases the issue was the meaning of the words "on board the aircraft or in the course of any of the operations of embarking or disembarking" (Warsaw Convention, 49 Stat. at 3018). The dispute was whether the Convention applied to passengers who were injured inside an air terminal building. Those cases did not concern and did not discuss whether "bodily injury" encompasses injury for fright or psychic trauma alone. No federal court of appeals has considered that issue.

The court below and the New York Court of Appeals in *Rosman, supra,* are the only appellate courts to have interpreted the words at issue. There is, therefore, no conflict between the decision below and that of any appellate court, state or federal.

III. The Guatemala Protocol May Obviate This Question in the Future

The Warsaw Convention was most recently amended in 1971 at Guatemala City. At Guatemala the words of Article 17 at issue here were changed from "death or wounding . . . or any other bodily injury" to "death or personal injury."[5] The Guatemala Protocol has been sent to the Senate for its advice and consent and hearings were held on July 26, 1977 (123 Cong. Rec. D1132 daily ed. July 26, 1977). The change in text may settle this issue as to future claims.

Finally, the Warsaw system is presently in transition. It has evolved from a system based on fault to one prem-

[5] ICAO Doc. 8932 (1971). The controlling French and the official English translations are as follows. The Warsaw Convention language, "mort, de blessure ou de toute autre lésion corporelle" translated "death or wounding . . . or any other bodily injury," was changed in the Guatemala Protocol to "mort ou de toute lésion corporelle" translated "death or personal injury."

ised on strict liability and, under the Guatemala Protocol, to one more akin to no-fault accident insurance with the passenger paying additional consideration for the coverage (CAB Order 77-7-85). The Guatemala Protocol, in conjunction with a Supplemental Compensation plan approved by the Civil Aeronautics Board will increase the limit of recovery from $75,000 to approximately $317,000 (*id.*). In addition, "further payments as may be required to effect full reimbursement of all reasonable medical expenses" will be made without regard to the $317,000 liability limitation (*id.*). The various economic and diplomatic considerations involved might best be left to the Senate at this time.

IV. The Decision Is Correct

The non-final order sought to be reviewed relies on *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E. 2d 848 (1974) which is clearly correct.

The legislative history of Article 17 demonstrates that the drafters did not intend that there be recovery for fright or psychic trauma alone. The original 1925 Convention draft stated:

> "The carrier is liable for accidents, losses, damage to goods and delays." (Conférence Internationale de Droit Privé Aérien, Paris, October 1925, Ministère des Affaires Etrangères 41-42 Series C. 79 (1926)).

The 1925 draft was amended and the words death, wounding or any other bodily injury were inserted (*Compte Rendu de la 3e Session,* May 1928, Comité International Technique d'Experts Juridiques Aériens 125).

In 1952 the authoritative writer on French Air Law, Professor Juglart of the Law Faculty of the University of Paris, stressed that mental injury (lésion mentale) was

not included within the present text of Article 17. He suggested that the Convention might be amended to read: "lésion corporelle ou mentale" (Juglart, *Traité Elémentaire de Droit Aérien,* 330 (1952)).

The precise amendment that Professor Juglart proposed in 1952 was considered in 1955 at The Hague where representatives of the nations which adhered to the Warsaw Convention, including the United States, met to amend the Convention. The Greek delegate at The Hague proposed the very amendment that Professor Juglart had suggested three years earlier. He proposed that the words "any other bodily injury" be changed to "any other mental or bodily injury." The precise French words proposed were ". . . ou de toute autre lésion corporelle ou mentale subie par un voyageur . . ." (Conférence Internationale de Droit Privé Aérien, La Haye, September 1955, Vol. 1, Doc. 7686-LC/140, p. 261, O.A.C.I. 1956). Among all the delegates present not one could be found to second the proposal.

The drafters of the 1966 Montreal Agreement, a contract among most of the international air carriers approved by the Civil Aeronautics Board, did not intend to make and did not make any change to the text of the Warsaw Convention. *MacDonald* v. *Air Canada,* 439 F.2d 1402, 1405 note (1st Cir. 1971). Professor Andreas F. Lowenfeld, Chairman of the United States Delegation to the Montreal Conference in February 1966, and one of the architects of the Montreal Agreement, criticized an action for fright alone which arose out of the same hijacking to Jordan experienced by petitioners:

> "The Montreal Agreement applies only to death, wounding, or other bodily injuries suffered by a passenger. Thus, mere delay or anguish will not support

a suit under the Agreement" (The New York Times, September 30, 1970, at 42, col. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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